LAW OFFICE OF
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Tina Stanczewski Receives ASSP Award

On June 5, 2018, The American Society of Safety Professionals (ASSP, formerly known as American Society of Safety Engineers) awarded Tina M. Stanczewski, Esq., the Environmental Practice Specialty Safety Professional of the Year award. Award recipients were honored at this year's ASSP Professional Development Conference in San Antonio, Texas.

Tina Stanczewski, Esq., MSP, is an attorney and safety professional focusing her practice on environmental law, labor and employment law including occupational safety and health and mine safety and health. She has represented employers and contractors nationwide in OSHA, MSHA, EPA, and local Maryland administrative law matters for the past ten years.

Tina speaks regularly on environmental topics including the California Joint Technical Symposium and conducts webinars on environmental topics. She is on the advisory committee for ASSP's Environmental Practice Specialty.

OSHA Silica Enforcement: Behind the Statistics

By Adele L. Abrams, Esq., CMSP

Federal OSHA started enforcement of its crystalline silica standard in construction on September 23, 2017, and already details are emerging about enforcement trends. While about 120 citations were issued since the new rule took effect, this only captures data from federal state enforcement, and some state plan states started later or have yet to commence issuing citations under the new rule. Maryland, for example, has proposed a similar rule in its Code of Maryland Regulations but regulatory changes have not yet been implemented.

Federal OSHA enforcement of its requirements for general industry and maritime under the new silica rule starts on June 23, 2018. However, earlier this month OSHA issued a memorandum to its regional administrators concerning General Industry/Maritime enforcement under the new rule. It states that:

- OSHA will assist employers that are making good faith efforts to meet the new standard's requirements during the first 30 days of enforcement.
- If employer is not making efforts to comply, OSHA officers will conduct air monitoring according to Agency procedures.
- Officers will also consider citations for noncompliance with the applicable sections of the new standard.
- During the first 30 days of enforcement, any proposed citations related to the Respirable Crystalline Silica Standard inspections will undergo National Office review.

INSIDE THIS ISSUE

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OSHA Silica Enforcement, cont.

Meanwhile, the range of subsections cited by OSHA for the construction industry reveals that intense scrutiny of employer efforts to conform with the complex rule is underway. The most commonly cited provision concerns inadequate (or absent) air monitoring: 28 percent of all citations issued to date fell into this category. This is significant, because exposure monitoring is the linchpin to all other aspects of regulatory compliance. In addition, the high percentage of citations for air monitoring suggest that construction employers have relied on "Table One" improperly, and so did not realize that they had to perform their independent sampling where all aspects of Table One are not adhered to completely. Other contractors may have inaccurately thought their work was covered by Table One when their task did not meet the criteria.

In essence, if your sampling is flawed, it will be "garbage in, garbage out" when it comes to development of the mandated written exposure control plan (WECP) needed for all workplaces where employee exposures to silica exceed 25 ug/m^3 (the "action level") for a workshift. Accurate exposure monitoring is required to know which job classifications, tasks or equipment must be included in the WECP, as well as which employees must be trained on silica hazards and controls, which workers must wear respiratory protection (and undergo medical evaluation and fit testing for respirator use), and which employees are covered by the employer's medical surveillance program.

OSHA is considering all aspects of exposure monitoring, from equipment calibration and placement, to whether tasks were manipulated by the employer to limit exposures or to intentionally skew the data. If such activities are discovered, OSHA can issue "willful" citations against the employer whose workers are overexposed, and there can also be ramifications for the general contractor or host employer whose subcontractors fail to follow the rule. If OSHA's data reveal an overexposure and the employer has sampled but their data reveal lower exposures, OSHA will generally resample to determine which party's samples are outliers. If OSHA finds a second overexposure, citations will be issued.

With abundant problems discovered in employer exposure monitoring programs, it is not surprising that the second most cited area concerns inadequate or absent written exposure control plans. The construction standard requires a site-specific plan, with a designated competent person (who must remain at the work site) who is qualified to implement the program and withdraw employees who may be at risk of overexposures. Approximately 21 percent of silica citations under 29 CFR 1926.1153 fell into this category. While construction employers may largely follow "Table One" if their work falls within the 18 enumerated categories of tasks and equipment, there is still a requirement to have the control plan on site and available for inspection by workers and by OSHA.

Affected workers (those anticipated to be exposed above the action level of 25 ug/m^3) must also receive training, in a language and vocabulary they can understand, on the health effects of silica exposure, the employer's specific WECP, the medical surveillance program, the specific controls to protect them, and housekeeping methods in use. If they use silica containing products, training must also be provided under the OSHA Hazard Communication Standard, 29 CFR 1910.1200, and duplicate citations can be issued under each standard if no training is provided. In addition, for those workers who must wear respiratory protection under the employer's WECP (or Table One), respiratory protection training must be provided, along with fit testing and medical evaluation to ensure that the worker can safely wear the assigned respirator.

OSHA data for September 2017 – April 2018 reveal that training violations made up 16 percent of all OSHA silica citations, while respiratory protection lapses constituted 6 percent of all violations. Finally, 3 percent of the citations related to the medical surveillance program, and 2 percent addressed violations of the housekeeping provisions (dry brushing and dry sweeping, as well as most uses of compressed air for cleanup are now prohibited).
OSHA's silica citations are generally classified as "serious" in nature, because overexposures to respirable crystalline silica at levels above the new permissible exposure limit of 50 ug/m3 (for an 8-hour time-weighted-average) are linked by OSHA with conditions ranging from silicosis and COPD to lung cancer, and even renal disease and auto-immune disorders.

The maximum OSHA civil penalty rose to $129,336 on January 2, 2018, and OSHA can issue separate citation items and penalties for each section of the new silica standard that is violated, although it has discretion to group violations with a single penalty – particularly where a single abatement action will resolve all non-compliance issues. However, OSHA also has discretion to cite an employer as an "egregious violator," which means that separate citation items and separate penalties can be issued for each affected worker (such as each worker

OSHA Silica Enforcement, cont.

whose overexposure is documented by OSHA sampling).

OSHA is continuing to develop compliance assistance on the rule's enforcement and interim enforcement guidance can be found on OSHA's website here but additional enforcement guidance is expected later this year.

OSHA's latest regulatory agenda also revealed plans to reopen the rule to expand "Table One" in the construction rule, and to consider adding a similar approach for common high-exposure tasks in general industry and maritime. In December 2017, the US Court of Appeals, DC Circuit, rejected the industry challenges to the final rule, but did accept the union challenge concerning OSHA's decision to eliminate medical removal provisions from the final rule. Therefore, inclusion of a medical removal component may be part of any updated rule in the future. OSHA will publish any proposed changes in the Federal Register for stakeholder comment.

For more information on compliance assistance with the OSHA silica rule, on-site support for sampling, plan development, and for competent person training, contact the Law Office at 301-595-3520 (Eastern) or 303-228-2170 (Western). Our attorneys include individuals certified as industrial hygienists and safety professionals.

OSHA Holds Public Meeting on Transportation Industry Whistleblower Programs

By Gary Visscher, Esq.

OSHA recently announced in the Federal Register and on its website that it plans to hold a series of public meetings for the purpose of "obtaining information from the public on key issues facing the agency's whistleblower program." OSHA stated that the purpose is to receive comments and suggestions on improving its "customer service" and providing assistance in explaining the whistleblower laws it enforces.

The first of the public meetings was held on June 12, 2018 and was specifically focused on whistleblower programs in the railroad and trucking industries – under the Federal Railroad Safety Act (FRSA), the Surface Transportation Assistance Act (STAA), the National Transit Systems Security Act, and Section 11(c) of the OSH Act.

OSHA has responsibility for receiving and investigating whistleblower complaints under 21 laws, in addition to the anti-retaliation provisions in section 11 (c) of the OSH Act. These laws range from financial to health care to energy and transportation areas. OSHA noted that STAA and FRSA complaints are amongst the most common non-11(c) whistleblower complaints that OSHA investigates. Last year OSHA received 420 complaints under STAA and 293 under FRSA. Among the comments and suggestions made at the meeting:

- OSHA should request a significantly larger budget for investigating whistleblower complaints.
- OSHA should require posting of employee rights to file whistleblower complaints, and toll the statute of limitations for filing a complaint if such notice has not been posted.
- OSHA should do more to publicize "good results" for complainants; if employees were more aware of such cases, more employees would be encouraged and willing to file complaints.
- Recognizing that many complaints are not "legitimate" and yet require employers to spend considerable time and resources in responding, OSHA should issue guidance to better inform employers and employees on the standards for what constitutes a "legitimate" whistleblower complaint.

Although the meeting was to address OSHA's role in transportation-industry whistleblower complaints, a number of speakers focused on shortcomings by other agencies. Particularly, the Federal Railroad Administration and the Federal Motor Carrier Safety Administration received criticism for not taking actions which are authorized by law against operators and managers which violate workers' rights to complain about health and safety concerns.

OSHA has not yet announced when subsequent meetings will be held.

Objective Data and its Connection to a General Industry Table 1

By Michael R. Peelish, Esq.

The Silica Standard discusses several options for conducting air monitoring – the Performance option and the Scheduled Monitoring option. The Scheduled Monitoring option is exactly what it says, essentially gathering silica exposure data points. Deploying the Scheduled Monitoring option over time could lead to an employer gathering sufficient data points to utilize the Performance Monitoring option since the Performance option gives employers lead way in managing ongoing

Objective Data, cont.

monitoring obligations. In other words, the employer can develop its own objective data through Scheduled Monitoring that can lead to the use of the Performance option. OSHA does not provide much guidance on what constitutes objective data and places the burden on the employer. Our firm has been defining objective data for employers and associations to enable the development of an approach that will withstand OSHA's scrutiny. We have been working primarily on construction sites, however we are seeing more of our General Industry clients begin to take hold of this concept.

Essentially, objective data gathered at General Industry plant sites over time can lead to the development of a General Industry Table 1. Why should the Construction Industry be so lucky? In fact, many of the Construction Industry Table 1 tasks are performed at General Industry plants, however air monitoring must be conducted to confirm the results under the General Industry approach. To alleviate this ongoing air monitoring, our firm believes that through General Industry efforts a defensible Table 1 can be developed.

The key to objective data and a General Industry Table 1 is the quantification of the task performed while the sampling data is being collected. For instance, our firm has developed written exposure control plans for employers that define very specific activities such as how many holes were drilled at a specific depth and diameter; or how many linear feet were wet grinded on the edge; or how many linear feet were cut with a wet or dry saw just to name a few tasks. To pursue this approach, individual employers or coalition's of employers or industry associations can develop objective data and ultimately a General Industry Table 1.

As we all know, the silica standard requires ongoing monitoring every 3 or 6 months depending on the exposures levels. This will continue for eternity unless employers can plan and execute how to conduct an exposure assessment that gives them a long-term advantage. Our firm is actively developing objective data for its Construction Industry and General Industry clients. For the General Industry clients, there is even greater value because we are essentially developing a General Industry Table 1.

California Supreme Court Ruling Changes Independent Contractor Classification

By Joshua Schultz, Esq., MSP

A recent ruling by the California Supreme Court tightened the definition of an independent contractor, increasing the difficulty of employers to avoid state rules on minimum wage, overtime and rest breaks.

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, the court held that employers may deny workers the status of employee, and the legally required benefits, "only if the worker is the type of traditional independent contractor — such as an independent plumber or electrician — who would not reasonably have been viewed as working in the hiring business."

The Dynamex court invoked a test, known as the "ABC Test," to determine if a worker is subject to California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of a California employee. The court noted that for the wage order not to apply the hiring entity must establish the following elements for workers:

(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Previous to this Dynamex decision, courts have relied on a test involving the principal factor of "whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired."

This ruling and the updated, more stringent standard will have far-reaching implications for California employers. The ruling may require ride-share services Uber and Lyft to classify their drivers as employees subject to minimum wage requirements.

California Supreme Court, cont.

Further, Administrative Law Judges for California's Occupational Safety & Health Appeals Board, which hears CalOSHA cases, may look to this definition when evaluating training requirements and liability on multi-employer sites.

OSHA

Top 10 Most Frequently

Cited Standards in 2017

These standards below are the top 10 most frequently cited OSHA standards for 2017. As we pass the mid-point of 2018, remember to be vigilant about complying with OSHA standards.

29 CFR 1926.501: Fall protection, construction

29 CFR 1910.1200: Hazard communication standard, general industry

29 CFR 1926.451: Scaffolding, general requirements, construction

29 CFR 1910.134: Respiratory protection, general industry

29 CFR 1910.147: Control of hazardous energy (lockout/tagout), general industry

29 CFR 1926.1053 Ladders, construction

29 CFR 1910.178 Powered industrial trucks, general industry

29 CFR 1910.212 Machinery and Machine Guarding, general requirements

29 CFR 1926.503 Fall Protection–Training Requirements

29 CFR 1910.305 Electrical, wiring methods, components and equipment, general industry

(Taken from www.osha.gov, June 16, 2018)

Arbitration Clause May Waive Right to File Class Action in Court

By Gary Visscher, Esq.

Last month the U.S. Supreme Court issued its decision in the aptly titled "Epic" case (*Epic Systems Corp. v. Lewis*, issued May 21, 2018).

The Supreme Court's decision resolved a conflict among the circuit courts of appeals as to whether an employee's agreement to individually arbitrate employment claims against his or her employer precludes the employee from filing a class or collective action claim in court.

The Supreme Court has regularly upheld the enforcement of arbitration clauses in contracts, including in consumer contracts, and in individual employee's claims under employment laws, such as the Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA). Such clauses require that a dispute or claim under the contract is subject to arbitration, rather than by filing a complaint in court. Citing previous decisions, in Epic the Supreme Court said that the 1925 Federal Arbitration Act established "a liberal federal policy favoring arbitration agreements." The Court has held that agreements to arbitrate may only be set aside in accordance with generally applicable contract defenses, such as fraud, duress, or unconscionability.

The new issue in Epic was whether section 7 of the National Labor Relations Act (NLRA), which protects employees' "right to self-organization …to bargain collectively… and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection", in effect displaced or overrode an arbitration agreement with regard to collective or class actions for wage and hour claims. The majority found no explicit indication that in enacting the NLRA, Congress intended to "displace" the Arbitration Act. Nor did the majority find that there was a necessary conflict between the two statutes. Thus, the majority said, the two statutes must be read to give effect to each statute.

Regarding the question of whether there was a conflict between the two statutes, the majority and dissenting opinions disagreed over the scope of the term "other concerted activities" in section 7 of the NLRA. The majority opinion said that under traditional

Arbitration Clause May Waive Right, cont.

rules of legislative interpretation, "where, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Thus, the "other concerted activities" in section 7 refers to activities related to the right to organize and bargain collectively. The dissenting opinion by Justice Ginsburg strongly disagreed with this narrow definition of "concerted activities," and would have specifically found that "[s]uits to enforce workplace rights collectively fit comfortably under the umbrella 'concerted activities for the purpose of mutual aid or protection.'"

The National Labor Relations Board (NLRB) had filed a brief in support of construing section 7 as allowing the employee to proceed with the class and collective actions. The majority declined to give "Chevron deference" to the NLRB's position, noting that the NLRB had previously held the opposite position, and the U.S. Department of Justice had filed a brief before the Supreme Court opposing the NLRB's position in this litigation. The majority also noted that the case involved two statutes, the Federal Arbitration Act and the NLRA, and while the NLRB was charged with enforcing the latter, it did not have a similar role with the Arbitration Act.

If you have any questions or would like more information about the Supreme Court's decision, or about employment arbitration clauses more generally, please let us know.

Summer Safety Alert: Watch for Heat Stress & the Sun

By Adele L. Abrams, Esq., CMSP

Summer is here, the sun is shining, and OSHA is watching! This time of year, heat-related illnesses can be a major problem for outdoor industries including construction, trucking, concrete production, and mining. OSHA uses its General Duty Clause (Section 5(a)(1) of the OSH Act) for enforcement against employers who expose workers to heat stress or fail to implement effective protective programs. The agency's authority to do this, and how heat stress factors are benchmarked, is currently under review by the Occupational Safety & Health Review Commission, but in the interim, here are a few safety practices that can help protect workers and avoid costly citations.

Employers should watch for the following and make sure workers are protected from adverse health effects:

- **Ambient or outdoor temperatures**: when temperatures rise, it is harder for the body to cool itself and adverse impacts can range from heat stress and exhaustion to death.
- **Physical condition**: workers who are obese, out of shape or have underlying conditions such as high blood pressure or heart disease may be at elevated risk of heat-related illness. Workers should be educated about the reactions of medications they may take with heat or sun exposure and ensure that there are no restrictions on their ability to safely work. If there are limitations, workers should let the employer know so they can be reassigned where possible to a position where they will not be at risk.
- **Humidity**: high humidity can prevent sweat from evaporating and raise the danger of working conditions in high temperatures.
- **Workload:** where possible, on extremely hot and humid days, consider postponing tasks involving heavy physical labor or overexertion.
- **Clothing**: watch for clothing that may interfere with cool-off or which can trap heat and look for alternatives where possible that allow quicker sweat evaporation.
- **Radiant heat**: this can add to exposures, by reflecting off windows and metal structures and adding to the environmental exposures.
- **Wind**: breezes help to cool workers, generally, but where ambient temperatures are above 98 degrees, fans and breezes can make the situation worse.

If a worker is showing signs of heat stress or exhaustion, it is possible that heat stroke or death can quickly follow. In the case of heat stroke, call 911 immediately and immerse the worker in cold water or wrap them in ice packs or cooling blankets. If heat exhaustion is suspected, move the person into the shade or air conditioning, lay them down and elevate their legs, remove heavy or tight clothing, and provide cool water or non-alcoholic beverages without caffeine.

The individual can be further cooled off by spraying them with cool water and fanning them. The worker's condition should be monitored and medical assistance

Summer Safety Alert, cont.

sought if their condition does not improve or deteriorates.

Prevention is the best medicine, of course, and heat stress can be avoided by providing workers with plenty of cool water (a cup every 15 minutes is recommended in high-heat situations), allow rest breaks based on heat factors and workload. Shaded or air-conditioned areas should be provided for worker breaks and an appropriate work/rest cycle should be developed. Workers will need to be acclimatized to the heat after long weekends, or at the start of the summer. Finally, management should monitor workers, or use a buddy system, where temperatures exceed 95 degrees, so that symptoms of heat stress can be identified before damage occurs and addressed appropriately.

Commission Considers Heat Related Hazards Under General Duty Clause

By Gary Visscher, Esq.

Even while OSHA continues to warn employers of the dangers for employees working outdoors in excessive heat (see http://www.osha.gov/heat/) a case recently argued before the OSH Review Commission may undercut OSHA's ability to cite employers under the general duty clause for exposing their employees to heat related hazards.

The case, *Secretary of Labor v. A.H. Sturgill Roofing*, is on appeal from an Administrative Law Judge's 2015 decision which affirmed two serious citations against A.H. Sturgill, growing out of an inspection OSHA conducted after receiving a report that an employee had collapsed and later died while working on a building re-roofing project in August 2012.

Sturgill employees were removing an existing flat white roof on a large office building. The employee who died was a temporary employee on his first day of work for A.H. Sturgill. In addition to this being his first day working in summer outdoor conditions (after working for previous three years on the night shift indoors in an air conditioned facility), the employee was also "a much older guy" (60 years old), and had shown up for work on his first day wearing a black sweater and black pants.

In part because the employee was new (though he told Sturgill that he had previously done roofing work), the foreman assigned the employee to "the least strenuous work" on the roof, removing trash items from a cart that was brought to him, lifting the material over a 39-inch parapet wall, and pushing or dropping it into a dump truck below. The foreman also instructed the employee that he should ask for breaks when needed, and to drink plenty of water. Beyond that, according to the ALJ, the employee was not provided specific training on heat related hazards or on recognizing the signs and symptoms of heat related illness.

During the late morning, other employees noted that the employee was quiet, and later began walking in a clumsy manner. The supervisor asked him on at least two occasions if he was feeling ok, and the employee said he was and kept working. After a third inquiry, the supervisor insisted that the employee sit in a shaded area on the roof. Shortly after the employee became ill and collapsed. He was taken to a hospital and remained there for 21 days until he died. The coroner ruled that the death was from "complications of heat stroke."

OSHA issued two "serious" citations – one for a general duty clause violation, the other under §1926.21 (b)(2), failing to provide adequate training on the recognition and avoidance of unsafe conditions.

In order to prove a general duty clause violation, OSHA must prove (1) the condition or practice presented a hazard, (2) the employer or industry recognized the hazard, (3) the hazard was likely to cause death or serious injury, and (4) feasible means exist to eliminate or materially reduce the hazard. (cont. pg. 10)

OSHA Changes Policy for VPP Sites

By Tina Stanczewski, Esq., MSP

On May 30, 2018, OSHA issued a Revised Voluntary Protection Program (VPP) Policy – Memorandum #7, replacing a 2013 memorandum, effective immediately. The new policy allows OSHA flexibility in deciding whether sites that suffer an employee fatality can remain in the VPP program. Concerns have arisen as to whether this flexibility diminishes the goals and integrity of the VPP program.

With limited resources, OSHA cannot inspect all regulated sites. The VPP program, begun in 1982, provides a platform for sites to excel with safety and health programs, training, and reduce job-related injuries to achieve and maintain status as a company that "owns" preventing employee injuries. OSHA's data shows that VPP sites are 52% below the average rate for days away from work, restricted duty, or transfer to another job as a result of injury. After applying to be part of the VPP, sites are evaluated and follow performance-based goals to meet safety and health targets. Participants of VPP should maintain injury and illness rates below the national averages in their industry.

OSHA Changes Policy, cont.

As any other OSHA-regulated facility, a VPP site must notify OSHA of a fatality/catastrophe at their site within the statutory guidelines (see 29 CFR 1904.39). For VPP, this includes a non-VPP contractor working at the site. The new procedures to be followed whether the facility reports or OSHA learns of the incident through other channels, include:

1. The Regional office notifies the Office of the Assistant Secretary via the Directorate of Cooperative and State Programs (DCSP) with the following information:
   - Site name, site address, contractor name and address (if applicable)
   - Was it a fatality or catastrophe?
   - Did the site fail to report?
   - VPP status of facility,
   - Date of initial approval in VPP,
   - Date of most recent reapproval in VPP,
   - North American Industry Classification System code for facility,
   - Date of Incident,
   - Brief incident description and
   - Union information, if any
2. Within 30 days of reporting, the VPP status for the site is changed to "Inactive Pending Inspection".
   - The VPP site receives written notice in the change of status. The site is required to stop using or displaying VPP related identifiers.
   - OSHA will change the VPP site's status in its materials and media.
3. If the site meets the requirements of a reportable incident number 1 above and a citation is issued, then a "Notice of Intent to Terminate" will be issued within 30 calendar days of the citation issuance.
   - Before the ITT is issued, the Regional/Area office will meet with the site and review its safety and health program and issues around the incident. OSHA may determine that termination is not appropriate. The site may present information as to why they should remain in VPP.
   - If OSHA believes the site should be terminated from VPP, then the site has the choice to voluntarily withdraw or be terminated.
4. The site may appeal the decision to the Assistant Secretary within 30 days of receiving the notice to appeal, and provide mitigation in support of remaining a VPP site. The Assistant Secretary, Regional Administrator, and DCSP will decide whether the site remains in VPP.

The new policy is a departure from the 2013 Memorandum. That policy automatically included an immediate Intent to Terminate (ITT) Letter for fatalities, then an appeal to the Assistant Secretary. Historically, OSHA has faced difficulty in ensuring VPP members maintain the requirements of the program as participation has grown. In 1995 VPP had 200 participants and by 2008 it had 2,174. Data shows that VPP sites have had fatalities and serious injuries over the years, but remained part of VPP. With the new policy in place, sites may continue to remain in the program even with a fatality. For many, this is a departure from the intent of the program and the dedication that many VPP sites make to ensure they are fatality-free.

House Eyes OSHA Funding Cuts

By Adele L. Abrams, Esq., CMSP

On June 15, 2018, the House Subcommittee on Appropriations for the Departments of Labor, HHS and Education approved a funding package for FY 2019, that slashes monies available at both the Department of Labor (DOL) overall and for the Occupational Safety & Health Administration (OSHA) in particular.

The narrative in the full Committee report states, for the DOL: "The bill provides a total of $12.1 billion in discretionary appropriations for DOL – $88.8 million below the fiscal year 2018 enacted level. The bill provides robust funding for job training programs and sufficient funding for labor enforcement and benefit protection agencies to fulfill their core missions, while reducing lower-priority and underperforming programs." In the case of OSHA, this means a potential reduction from the current FY 2018 funding level of $552.78 million to $545.25 million for FY 2019 – a reduction of about 1.4 percent. This is actually below President Trump's proposed funding level for OSHA of $549 million for FY 2019.

As part of the package, the Susan Harwood worker training grants program would be abolished, saving $10.5 million. The Harwood grants have been an evergreen target for OSHA cuts, but have so far been preserved each year by the Senate, or through the funding of the agency via continuing resolutions. Congress has not enacted a Labor-HHS appropriations bill in several years.

Little information is yet available concerning the future of the National Institute for Occupational Safety and Health (NIOSH), but the President's FY 2019 budget called for its removal from the Centers for Disease

House Eyes OSHA Funding Costs, cont.

Control (CDC) and transfer of its activities to the National Institutes of Health (NIH). The House Appropriations report includes a total of $7.6 billion for CDC – $663 million below the fiscal year 2018 enacted level and $2 billion above the President's budget request. NIH would receive $38.3 billion, an increase of $1.25 billion from the current year, and $4.1 billion more than the President's budget request.

At this time, more detailed programmatic allocations under the House funding package are not yet available, but the House Appropriations Committee is slated to mark up the bill on June 20th, prior to the recess and more details should be available soon. For additional information, contact Adele Abrams at safetylawyer@gmail.com.

Labor Department Proposal May Roll Back Youth Worker Protections

By Diana R. Schroeher, Esq.

The U.S. Department of Labor announced it will propose new rules to expand the exceptions for teens between the ages of 16 and 18 to work in certain "hazardous occupations". The agency's current rules prohibit youth from performing hazardous jobs such as operating a chainsaw, running power-driven equipment and working in the roofing industry. The Labor Department's Spring 2018 semi-annual regulatory agenda announced the notice of proposed rulemaking, scheduled to be released in October 2018.

Until now, federal law has prohibited teens from working in certain hazardous industries. The Fair Labor Standards Act's Child Labor regulations have been in place for many decades, and the Hazardous Occupations Orders (HOs) have identified 17 different occupations that are "particularly hazardous for minors between the ages of 16 and 18 years or detrimental to their health or well-being." DOL Wage & Hour regulations, 29 CFR § 570.50 – 570.68. There are some limited exemptions for registered apprentices and student learners which require high levels of supervision, limited work hours, and other protections. But several of the HOs ban employment in certain industries under any circumstances. These industries include roofing, coal mining, forest fire fighting, and work in the demolition industries.

One year ago, in June 2017, President Trump issued an Executive Order "Expanding Apprenticeships in America" with a stated purpose of promoting affordable education and rewarding jobs for Americans. The president cited ineffective workforce development programs and federally-funded education as failing to match unemployed Americans with open jobs, which included the "350,000 manufacturing jobs currently available". The Executive Order called for the Secretary of Labor to propose new regulations to overhaul apprenticeship programs and to promote apprenticeships to business leaders in critical industry sectors, including manufacturing, infrastructure, cybersecurity and health care, according to DOL's June 15, 2017 Press Release. "The U.S. Department of Labor will work expeditiously to execute the president's vision and begin to implement measures to expand the apprenticeship and vocational training programs that can help our economy thrive, while keeping good, high-paying jobs in America," Secretary Acosta said.

One year later, the agency responded with the announcement of the proposed rulemaking, which will include relaxing the rules protecting the safety of youth workers. The initiative is already receiving criticism. On May 23, 2018 and in response to the proposed rulemaking, Congressman Keith Ellison (D-MN), Financial Services Committee, wrote to Secretary of Labor Acosta expressing concerns over the proposed rulemaking and requiring answers. Congressman Ellison stated that, given the historical injury rates, "rolling back these regulations could jeopardize the safety of America's youth and lead to an increase in the rate of workplace injuries, or even death, for underage workers." He stated that expanding the apprentice and student learner exemptions for workers age 16 and 17, for hazardous jobs "will undoubtedly reverse the progress we have made over the last two decades to ensure our young people live safe and healthy lives." Congressman Ellison requested responses from Secretary Acosta to questions including supporting reasons for the agency's expansions of the Hazardous Order exemptions for youth.

The proposed rule is expected to be issued in October 2018. Publication will undoubtedly fuel new debates over the balance between maintaining a safe working environment for youth workers and expanding employment opportunities for all Americans.

Commission Considers Heat Related Hazards Under General Duty Clause (Continued from page 7)

By Gary Visscher, Esq.

Before the Commission, the Secretary argued that the existence of the hazard was proven by (1) the death of the employee, and (2) by the NOAA "heat index." However, OSHA's expert testified at the hearing that the employee's death was likely due to the combination of heat and humidity and the worker's individual conditions (age, lack of acclimatization, etc.). OSHA's use of the heat index in this case was undermined by the fact that OSHA did not have actual readings of the temperatures on the roof – the heat index based on conditions generally that day were in the "caution" category but OSHA assumed that higher temperatures on the roof put conditions there in the "danger" category.

The questions and comments by the Commissioners at the oral argument indicated that the Commission is likely to reverse the general duty citation. If so, the question will be how broadly the Commission's decision is written. The Commission may decide on the basis of a lack of evidence as to the hazard in this particular case. Or, as some of the questions indicated, the Commission may decide more broadly that the hazards of working in hot weather are not hazards that the general duty clause was intended to address.

OSHA is probably on stronger grounds with the employee training citation under §1926.21. Sturgill acknowledged that it provided specific training on recognizing and preventing heat-related illnesses to its permanent employees, but had not provided the same training to its temporary employees.

2018 SPEAKING SCHEDULE

ADELE ABRAMS
June 19: BLR Webinar, Motivating Safe Behavior
June 22: MTBMA Annual Meeting, Cambridge, MD, presentation on crystalline silica
June 28: Sassaman Safety Training, Presentation on Crystalline Silica, Valley Forge, PA
July 19: Pennsylvania Aggregates & Concrete Assn., Webinar on MSHA's New Workplace Examination Rule
Sept 6-8, Mining Expo International (MEI), Las Vegas, Presentation on OSHA Crystalline Silica Rule & Impact on Mining
Sept. 21: ASSE Region VI PDC, Presentation on OSHA/MSHA Update in the Age of Trump

TINA STANCZEWSKI
Sept. 20: N.C. Mine Safety & Health Law School, Castle Hayne, NC

Adele L. Abrams presenting at the ASSP Professional Development Conference in San Antonio, Texas. Adele presented on ADA, OSHA and Medical Marijuana, Crystalline Silica, and Whistleblower Protections for Safety Professionals, June 4-5, 2018.