



Relief on Crane Operator Certification May Be Coming

By Adele L. Abrams, Esq., CMSP

On February 10, 2014, the Occupational Safety & Health Administration (OSHA) published a proposed rule aimed at revising one of the more controversial provisions of its 2010 final rule governing operation of cranes and derricks in construction: operator certification. The final rule, issued on August 9, 2010, was developed through a negotiated rulemaking committee (C-DAC) that was comprised of most major construction associations and unions, plus safety and construction professionals and consultants. The provision at issue - which required employers to ensure that all crane operators were certified by November 10, 2014 - was agreed to by the committee but it was the interpretation of the rule that became contentious after the rulemaking was completed. In addition, lack of capacity to train all the crane operators who would require it, in the way that OSHA was requiring, was an additional concern.

The final rule was codified in 29 CFR subpart CC (the specific provision under review is in section 1926.1427). The version adopted closely followed C-DAC's recommendations and required all crane operators to be certified by the deadline under at least one of four options:

1. Certification by an independent testing organization accredited by a nationally recognized accrediting organization;
2. Qualification by an employer's independently audited program;
3. Qualification by the U.S. military; or
4. Compliance with qualifying state or local licensing requirements.

The third party certification option (#1) is the

only certification that is "portable" - where the crane operator could move from one company to another and still be in compliance with the crane standard.



This is also the only option available to all employers, and OSHA and C-DAC anticipated that this would be the option most selected for compliance. This is because OSHA still is not aware of any audited employer qualification program within the construction industry (#2), the military will only certify federal employees of the Department of Defenses or the armed services (#3), and there are very few state or local governments who will certify crane operators.

Using Option #1, before an organization can issue operator certifications, it must be accredited by a national agency that determines the testing organization meets industry-recognized criteria for: written testing materials, practical examinations, test administration, grading, facilities and equipment, and personnel. The tests must be capable of accessing the operator's knowledge and skills regarding specific subjects listed in the standard, provide different levels of certification based on equipment capacity and type, have procedures to retest applicants who fail, and have testing procedures for recertification.

The "capacity and type" provision is one of the key stumbling blocks because this was not clear to many employers when the rule

INSIDE THIS ISSUE

Relief on Crane Operator Certification May Be Coming	1
New Ladder Safety Guidance From MSHA	2
Are OSHA Guidance Letters Circumventing Rule Making	3
Is Our Water Safe? The Freedom Industries Chemical Spill Is Spurring Increased Legislation At The State and Federal Level.	4



Relief on Crane Operator Certification May Be Coming (Continued from Page 1)

was adopted, and some put their crane operators through training already, only to find that it did not pass muster under the specific language of the rule (the operator's certification must be for the specific equipment they will be operating or a higher capacity equipment of that type). OSHA learned that two of the only four accredited crane testing organizations had been issuing certifications based only on "type" of crane, not including a "capacity" consideration.

While the rule envisioned a four-year "phase in" for certification, many in the construction industry, crane rental companies, insurance companies and certification organizations provided feedback that it would be impossible for full compliance in time. OSHA held a series of stakeholder meetings in 2013, and the issue was also addressed by the Advisory Committee on Construction Safety & Health (ACCSH). Some stakeholders asked that the capacity requirement be removed from the rule. Others argued that an operator's certification did not mean that the operator was fully competent or experienced to operate a crane safely on a construction worksite. OSHA listened and found the concerns to be valid, which is why the rule is being reopened.

As a result, OSHA is proposing to revise 1926.1427(k)(1) to extend the deadline for operator certification by three years -- until November 10, 2017 -- to provide additional time to consider rulemaking options.

ACCSH has recommended continuing the existing employer duties during the extension period and granting an indefinite extension, which OSHA refuses to do. OSHA seeks comment on the duration of the proposed extension (three years), the existing employer duties, and the alternative approaches that could be adopted for certification and the safety impact of doing so. OSHA's original rule had

contemplated that 22 fatalities per year would be avoided by the new requirements.

The number of assessments needed, and the number of affected crane operators and employers, are difficult to estimate due to the fact that some operators work continuously for one employer and are already assessed and certified; some crane companies rent both a crane and an operator to an employer, in which case the rental company would be responsible for operator certification; and some new hires may be certified but on different types and capacities of cranes from those they would operate at the new job.

In addition, after publishing the final rule, OSHA decided to exclude a significant percentage of digger-derrick equipment from the scope of the standard, which alters its original regulatory impact analysis.

The agency projects that nearly 120,000 new operators, 60,000 "type only" certified operators, and 36,000 crane operators who are experienced but not certified would be affected. Whether the four certifying agencies can handle this swell of certification requirements in a short period of time remains a concern, as does certification of experienced (but not tested) crane operators who may not speak or read English.

OSHA found that the rule will materially reduce a significant risk of harm to workers and is feasible. Comments or requests for a public hearing are due by March 12, 2014 (unless extended, which is possible) and should be submitted electronically to OSHA via <http://www.regulations.gov>, and filed under Docket No. OSHA-2007-0066 and identified as relating to "Cranes and Derricks in Construction: Operator Certification."

New Ladder Safety Guidance From MSHA

By Justin M. Winter, Esq.

On February 5th, 2014, MSHA presented a program aimed at ladder safety during the Metal/Non-Metal breakout session. Harvey Kirk and Marvin Lichtenfels discussed the new ladder safety guidance in an effort to clarify to metal/non-metal stakeholders the distinction between acceptable and citable ladder conditions under mandatory safety standard 56/57.11003. The aforementioned standard states that "ladders shall be of substantial construction and maintained in good condition." Despite the goal of the presentation, which detailed numerous examples of ladder

conditions that MSHA considers either acceptable or violative, the predominant theme of the session concerned case-by-case evaluation of ladder conditions. MSHA instructs their inspectors to utilize their discretion in order to determine whether a ladder is compliant.

MSHA does not mandate that portable, fixed, or special ladders meet specific construction or design specifications. Therefore, if an inspector determines that a ladder is defective in any discernable manner, a citation may be



New Ladder Safety Guidance From MSHA, Continued From Page 2



issued. Due to the general guidelines of the standard, MSHA inspectors are expected to document precisely why a ladder is not “substantially constructed” and/or not “maintained in good condition”, and to include such information in the citation. Ladders in storage may also be cited if the ladder is not tagged out and/or placed in a designated location in

order to prevent its use. However, inspectors may take a number of factors into account when evaluating a ladder in storage for a possible citation, such as pre-shift inspection requirements, evidence that the defective ladder was utilized, and frequency of use.

The presentation went into detail regarding potential citable ladder defects, such as bent or broken rungs, damaged structural support features, and weak rungs and side rails. The aforementioned list is not exhaustive, as MSHA instructs inspectors to examine each ladder and its usage in a comprehensive manner, and subtle damage may lay the foundation for a citation under 56/57.11003. Similar to the “substantial construction” language in the standard,

MSHA does not have specific guidelines clarifying what is meant by “maintained in good condition.” However, an inspector may determine that bent or broken rungs and/or weakened side rails may be indicative of either poor ladder maintenance or deficient construction.

In addition to the condition of the ladder, safe access may also form the basis for a ladder citation. 30 CFR 56/57.11001 states that Safe means of access shall be provided and maintained to all working places.” Weather conditions, such as icing, may render the ladder unsafe until the condition is abated. Slick or slippery surfaces due to an accumulation of material on the rungs may also deem the ladder citable. Means of accessing the ladder and ease of exiting the ladder may also be evaluated by the inspector. A high first rung or similar condition that may render access to the ladder difficult or dangerous, a citation under 30 CFR 56/57.11001 may be issued for a lack of safe access.

During the presentation, a participant inquired as to whether fixed mobile equipment ladders may be cited despite the fact that it was manufactured in accordance with American National Standards Institute guidelines. In response, MSHA stated that inspectors may take into account the fact that fixed mobile equipment ladders were manufactured according to American National Standards Institute guidelines; however, ladders that meet ANSI specifications may nevertheless be cited.

Are OSHA Guidance Letters Circumventing Rule Making?

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On February 4, 2014, a subcommittee of the House Committee on Education and the Workforce held a hearing regarding OSHA's use of guidance and other interpretive letters instead of formal the formal rulemaking process. The hearing was entitled “OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process”, and was led by chairman, Rep. Walberg of Michigan, who attempted to explore why OSHA has increased the issuance of guidance letters while failing to issue formal rules.

Although the letters contain a disclaimer that they are not new standard and cannot be enforced as such, industry stakeholders regularly cite the letters use as an enforcement tool by OSHA inspectors. Issues have arisen including the letters are not formerly published outside the OSHS website.

Additionally, the letters contents regularly include language or information that contradict existing standards, therefore confusing employers as to what the legal requirements are.

Lastly, the letters did not endure a key step in the democratic process for enforcing new requirement, the opportunity for public comment and input.

OSHA supporters claim the letters supply valuable information to employers and are a necessity given the rulemaking landscape. It is estimated at this time it takes roughly seven (7) years for a rule to become final from OSHA. Supporters claim that these letters provide critical updates to outdated OSHA standards, helping to protect America's workforce. This is a tactic used by other federal agencies as well.



Is Our Water Safe? The Freedom Industries Chemical Spill Is Spurring Increased Legislation At The State and Federal Level.

Tina M. Stanczewski, Esq., MSP

The January 9, 2014 chemical spill into the Elk River of West Virginia has left residents questioning the safety of their water supply and facing days if not weeks without pay. With 300,000 residents impacted, legislatures in the Senate, House of Representatives, and West Virginia state are reacting. Consensus among the groups focuses on stronger laws, increased enforcement, better planning, and accountability.

The Senate Environment and Public Works Committee held a hearing on February 4, 2014. Senator Ben Cardin (D-MD), stated: "Our laws are just not strong enough." Changes may be seen to the Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Toxic Substances Control Act (TSCA), and The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).



As a result of the spill, Senators Boxer, Manchin and Rockefeller introduced the Chemical Safety and Drinking Water Protection Act of 2014 (S.1961). The

proposed law establishes state programs to ensure regular inspections of chemical facilities, establishes design standards for tanks, and lays out emergency response plans. Senator Boxer opined that the Clean Water Act possesses the authority to manage spill prevention and control but the spill prevention provisions have not been implemented. Further, although states are required to perform source water evaluations to define susceptibility to pollution, the 1996 Amendments to the Safe Drinking Water Act do not require action once a water issue is identified. S. 1961 would address this concern.

Aside from notification, citizens and government officials are questioning the sufficiency of spill prevention. As Brent Fewell, former senior vice president with United Water stated, "First and foremost, this is a matter of spill prevention and protecting source waters." Prevention is the first barrier. The second is containment. In this situation, adequate secondary containment did not exist to prevent the chemicals from reaching the Elk River.

Besides S. 1961, other legislation has surfaced. Senator Rockefeller cosponsored two bills with Senator Schatz to

hold companies accountable when spills of non-hazardous substances occur. Senator Schatz, from Hawaii is dealing with a molasses spill that impacted Hawaii's waterways. The first bill amends CERCLA to require companies who spill materials that are dangerous but not deemed hazardous to pay for cleanup costs under the Superfund. Today, one of the chemical released into the West Virginia water, crude 4-methylcyclohexane methanol (MCHM), is not listed as hazardous, providing polluters with an escape. The second bill increases the Superfund cap for clean-ups from \$2 million to \$4 million.

"The spill disasters in Honolulu Harbor and in West Virginia may seem different, but they both reveal a disturbing loophole under the Superfund law. Neither molasses nor MCHM are designated as hazardous by the federal government, despite the damage that can occur to people's health, businesses, and our environment when spilled," Schatz said.

The US House of Representatives Committee on Transportation and Infrastructure, held a related hearing on February 10, 2014 in Charleston, W.Va. The focus at this hearing included regulating storage tanks, notification to water utilities, guidelines to utilities on handling contaminated water, and other guidelines.

American Water Works Association Deputy Executive Director for Government Affairs, Tom Curtis, testified at the hearing. Areas of concern included 1) guidance for utilities on processing contaminated water after a spill and 2) data on the chemicals used throughout the U.S. Currently, there are guidelines under the National Pollutant Discharge Elimination System whereby utilities obtain a permit to flush the contaminated water. Otherwise, the water is stored.

Randy Huffman, Cabinet Secretary for the West Virginia Department of Environmental Protection, discussed the need for regulations for above-ground tanks. Currently, the EPA does not have regulations or guidance for above-ground tanks.

The Senate and House are not the only arms of government involved. The President issued an Executive Order related to improving chemical safety by examining the existing authorities and assessing what additional measures are necessary. For now, industry must monitor the pending legislation and wait for reports and investigations to be completed. The one certainty is that with so much concern, change is likely.