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Maryland Legislature Considers Occupational Safety and Health Bills

By: Adele L. Abrams, Esq., CMSP

The 2015 legislative session kicked off with the House of Delegates and Senate considering two bills that address occupational safety and health, in quite contrasting ways.

The first measure, HB 192, deals with inspection and civil penalty authority held by the Maryland Occupational Safety and Health agency (MOSH), which is part of the Department of Labor, Licensing & Regulation (DLLR). MOSH is the state agency enforcing OSHA regulations and some of its own enhanced standards at private and public sector worksites in the state, except for federal worksites within the state (military bases, federal offices, etc.).

HB 192 would require MOSH to provide an employer with advance written notice 14 days in advance of inspecting a place of employment that has not been inspected in the preceding 3 years. It also would prohibit DLLR from assessing any civil penalty against the employer for violations found during these inspections except under certain circumstances. Those include imminent danger-related citations or a violation that presents a threat of physical harm to an employee. Those terms are not defined.

Notwithstanding the advance notice, the bill specifies that employees or authorized representatives of the employees can request an inspection if there is a good faith belief that imminent danger or a threat of physical harm exists. Similarly, DLLR can launch an inspection if there are reasonable

grounds to believe a danger or threat exists.

No hearings have been scheduled on HB 192. If adopted as introduced, it would reduce enforcement authority below that of federal OSHA, placing Maryland's state plan in jeopardy.

The other bill, HB 404, concerns safety prequalification of MD public works contractors, and was the subject of hearings in the legislature in late February. Both Adele Abrams and Tina Stanczewski of the Law Office testified as members of the American Society of Safety Engineers. Abrams also served as a member of a multifaceted Maryland State Work Group on contractor safety issues, and the group's consensus recommendations form the basis for the legislation.

As introduced, contractors bidding on public works construction contracts of \$100,000 or greater would have to attest to having and implementing a contractor safety and health plan that includes: (1) a commitment to occupational safety and health on the project; (2) the name of the company representative responsible for safety on the project; (3) methods that will be used to identify, assess, and document potential hazards on the project; (4) methods to prevent and control hazards; (5) methods used to train and communicate with employees related to safety and health hazards on the job; (6) methods of involving employees in identifying safety and health issues; and (7) methods used to continually evaluate hazards and modify the safety and health plan as needed. In short, the bidding contractor must attest that they have a safety and health management system (I2P2).

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MD Legislature, Con't

If a contractor is the successful bidder, more scrutiny would occur, using a worksheet developed by DLLR that considers incidence rates, OSHA citation history and also a number of leading indicators. Depending upon the contractor's score, work could proceed, or the contractor might be required to implement more training, or have a certified individual on site full time to manage safety. The requirements would flow through to subcontractors on the project.

MOSH would have authority to enter the worksite, observe how safety was implemented, interview individuals and review records to determine compliance with the safety and health program. Violations could result in a \$5,000 penalty for the first offense, \$10,000 for subsequent offenses, and debarment in the case of "knowing and reckless" violations. There are also sanctions for discrimination against any employee who is a whistleblower under the prequalification law.

Witnesses at the hearings included public sector representatives, safety organizations, labor unions, Public Citizen, major construction associations, and individual construction companies and subcontractors. Some amendments, including raising the contract value threshold are likely to be offered during future deliberation.

SIMILAR FACTS BUT DIFFERENT STANDARDS REQUIRE SEPARATE ANALYSIS

By: Sarah Korwan, Esq.

Despite having the same configuration and lockout tag out procedure on electrical panels for more than ten years, an operator was cited with four 104(d) Citations/Orders, designated as reckless disregard. Following a hearing, the Administrative Law Judge (ALJ) modified the Citation/Orders from 104(d)s to 104(a)s, reduced the designated negligence, and reduced the penalties. However, in *Sec. of Labor v. Sierra Rock Products Inc.*, (Jan. 13, 2015), the Federal Mine Safety Review Commission remanded one of the Orders to the ALJ because the ALJ failed to provide a specific unwarrantable failure analysis regarding Order 8561260, although the facts were similar to those in Citation 8561252.

On May 18, 2010, an inspector issued Sierra Rock Products, Inc. ("Sierra Rock"), Citation 8561252, a 104(d) Citation designated as significant and substantial ("S&S"), with high negligence, for an alleged violation of 30 C.F.R. § 56.12040 because

electrical components inside the panel were purportedly not properly guarded or protected when the breakers were deenergized from inside the panel.

During his inspection, the inspector was accompanied by Barry Hatler, the foreman and son of Sierra Rock owner, Jim Hatler, who demonstrated how the breakers were shut off by simply reaching inside the panel, while some parts were still electrified, and throwing the breaker switches which were about 6 inches from the exposed electrical components.

The next day, the same inspector returned and Jim Hatler voluntarily showed the inspector an electrical panel in the Motor Control Center ("MCC") with the same setup as the panel cited the previous day. The inspector informed Jim Hatler that this panel violated the same standard, but Mr. Hatler indicated he did not believe there was a violation. Mr. Hatler further explained to the inspector that this panel had been cited 10 to 15 years earlier for a different condition, and upon abating the violation the MSHA inspector accepted the configuration of the panel and it had been in the same condition ever since.

Later that day, after consulting with his district office, the inspector advised Mr. Hatler that he intended to issue a citation regarding the panel in the MCC and asked Mr. Hatler to deenergize the panel before opening the door. At this point, Mr. Hatler opened the panel and threw the breaker switches without first deenergizing the entire panel.

The inspector estimated that the switch was about 12 inches away from the electrified components. The inspector issued an Imminent Danger Order No. 8561259 on the panel and Order No. 8561260, alleging a violation of 30 C.F.R. § 56.12017, for failure to deenergize the components inside the panel before reaching into it. The inspector also issued Order No. 8561261, alleging a violation of 30 C.F.R. § 56.12040, for the same reason the he issued Citation No. 8561252, on a different inside panel.

Regarding Citation No. 8561252, the ALJ found that, although other elements of an unwarrantable failure existed, including the high degree of danger and the obviousness of the condition, the lack of previous enforcement mitigated the negligence of an operator.

SIMILAR FACTS, Con't

Therefore, the ALJ found that Sierra Rock's negligence was moderate and he vacated the unwarrantable failure. Further, the ALJ reduced the penalty from \$12,900.00 to \$6,000.00. For the same reasons, the ALJ found that the Secretary established an S&S violations of Order Nos. 8561260 and 8561261, but also vacated the unwarrantable failure and designated the negligence as moderate, and reduced the penalties.

Although the facts were similar, Order No. 8561260 alleged a violation of a different standard, section 56.12017, which requires that power circuits be deenergized and locked out before work is done on such circuits. Sierra Rock maintained that it did not violate the lockout provision because the procedure was to put a lock on the panel door once the two breakers were switched to deenergize the circuits.

The ALJ found that there was an S&S violation and an injury was highly likely to occur under normal mining operations. However, the ALJ modified the order to a 104(a) citation and modified negligence to moderate, stating that the negligence and 104(d) was modified for the same reasons that citation 8561252 was modified.

The Secretary appealed the ALJ's decision, alleging the Judge erred in modifying the unwarrantable failure designation and reducing the negligence by failing to provide a separate analysis for order 8561260 and ignored aggravating factors.

The Commission agreed with the Secretary and vacated the ALJ's findings of no unwarrantable failure and moderate negligence with respect to Order No. 8561260, and remanded for further analysis. Specifically, the Commission stated that although the panels' configuration and deenergizing procedure were related, "the relevant standards imposed separate and distinct duties." Therefore, referring back to his unwarrantable analysis for Citation No. 8561252, the ALJ failed to consider all of the relevant facts and circumstances with respect to Order No. 8561260.

MSHA Announces Results from First Phase of the New Coal Dust Rule By: Joshua Schultz, Esq., MSP

MSHA has issued a press release regarding the first phase of the new coal dust rule, noting that more than 23,600 dust samples have been collected, and results show that about 99 percent of samples are in compl-

ance. The rule, titled "Lowering Miners' Exposure to Respirable Coal Mine Dust," first went into effect last year.

The coal dust rule has three rollout dates which each contain different provisions of the rule. The first set of provisions were implemented on August 1, 2014. Notable among these provisions was that MSHA began issuing citations for noncompliance with the respirable dust standards when a single MSHA sample shows excessive levels of dust, rather than an average of samples. Additionally, the rule extended periodic x-ray requirements for underground coal miners to surface miners, and requires mines to provide lung function testing for both underground and surface coal mines.

The coal dust rule requires operators to conduct sampling at "Designated Work Positions" or "DWP's". The standard specifies that these DWPs are highwall drill operators, bulldozer operators, and other work positions designated by the District Manager after MSHA performs sampling at the mine site. Not all bulldozer operators are required for designation as a DWP. If there are multiple bulldozers in each work position performing the same activity or task at the same location at the mine and exposed to the same dust generation source, operators only have to sample the area exposed to the greatest respirable dust concentration.

Operators have expressed confusion about the health examination requirements for underground and surface coal miners. Some operators employ persons who visit their coal mine on an irregular basis. These persons are subject to the health examination requirements if they are considered "miners" within definition of the Mine Act, Part 46 and Part 48.

The coal dust rule requires that operators provide voluntary examinations ("provide the opportunity"), including chest x-rays, spirometry, symptom assessment, and occupational history at least every 5 years to all miners employed at a coal mine, at no cost to the miner. Additionally, operators must ensure that all new miners receive chest x-rays, spirometry, symptom assessment, and occupational history no later than 30 days after beginning employment and a follow-up examination no later than 3 years after the initial examination. MSHA's policy notes that this applies to persons who have "never worked in a coal mine before" — not miners with prior experience at a coal mine, but who are new to an individual operator's mine.

Coal Dust Rule, Con't

Operators must also prepare for two additional rollouts of provisions. Beginning on February 1, 2016, mine operators will be required to use continuous personal dust monitors (CPDM) to monitor underground coal mine occupations exposed to the highest respirable dust concentrations, as well as all miners with evidence of black lung. On August 1, 2016, the rule reduces the concentration limits for respirable coal dust. The overall respirable dust standard in coal mines will be reduced from 2.0 to 1.5 milligrams per cubic meter of air.

Legislation Reintroduced to Monitor EPA's Use of Scientific Studies & Advisors on Science Advisory Board By: Tina M. Stanczewski Esq., MSP

After failed attempts at passage in the Senate last year, House Republicans have reintroduced the Secret Science Reform Act (HR 1030) and Science Advisory Board Reform Act (HR 1029). HR 1029 was introduced in the House by representatives Frank Lucas (R-OK) and Collin Peterson (D-MN) and in the Senate by senators John Boozman (R-AR) and Joe Manchin (D-WV). HR 1030 was introduced by Rep. Lamar Smith (R-TX)

The Secret Science bill seeks additional accountability from the Environmental Protection Agency (EPA) related to disclosure of the scientific data used to base its decisions. The bills prohibits regulations being "based on science that [is] not transparent or reproducible." It requires the EPA to base decisions on the best available science that is available for independent review. The bill provides a budget of \$1 million per year. However, the Congressional Budget Office (CBO) estimates the bill's cost at \$250 million annually. Even under this estimate, the CBO believes the EPA would have to decrease the number of scientific studies used.

The Science Advisory Board Reform Act seeks to amend the rules concerning which scientists serve on the Science Advisory Board (SAB), The SAB advises the EPA on the science used for regulations. It consists of both scientists and economists. Traditionally, academics sit on the board.

Opponents of the bills believe they are spurred by Republican-agenda to limit EPA's authority and to place more corporate-friendly advisors on the SAB. The President has threatened to veto the bills if passed.