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ADELE L. ABRAMS P.C.

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Criminal Prosecution of CEOs: Shape of Things to Come?

By: By Adele L. Abrams, Esq., CMSP and Sarah Ghiz Korwan, Esq.

Six years and one day after an explosion at Upper Big Branch Mine, Raleigh County, WV, claimed the lives of 29 miners, former Massey Energy CEO, Don Blankenship, was sentenced to a year in federal prison and ordered to pay a $250,000.00 fine, an amount well above what the federal sentencing guidelines recommend.

Following his sentence, he was released and allowed to self-report to prison. The day after sentencing, Blankenship's attorneys filed a notice of appeal to the Fourth Circuit Court of Appeals, along with a request for relief from U.S. District Court Judge Irene Berger's denial of a stay of sentencing pending the outcome of the appeal.

Blankenship was convicted of conspiring to violate federal mine safety and health standards at the Upper Big Branch operation. However, he was exonerated of three felony SEC-related charges that could have resulted in a prison term of 30 years.

The December 2015 prosecution is unprecedented as Blankenship is the highest ranking official ever to be convicted – even indicted - on federal criminal charges stemming from a coal mine accident. His renowned micromanagement style, which involved recording telephone calls with subordinates, receiving production reports every 30 minutes (even after regular business hours), and an in-depth knowledge of his mines, clearly led to his own demise. Notably, the prosecution argued that his demands led to an unspoken conspiracy to ignore safety standards and practices if they interfered with production and profits.

A New York Times Op-Ed article, published the day after Blankenship's April 6th sentencing, carried the headline "Judgment Day for Reckless Executives." It lamented the leniency of the available sentence, calling it "a failure of law, not the facts of the case," but said that the case should be a salutary warning to other industrial executives and not viewed as a one-off that is unlikely to recur.

Other investigations of fatalities at workplaces ranging from mining to manufacturing to the oil and gas sector are increasingly shining the spotlight on management's cost-cutting that can lead to neglect of maintenance, management's "scofflaw attitudes" toward safety and health, and any emphasis on production (and short cuts) over safe work practices. Where such practices can be documented, and are coupled with allegations of willful violations (OSHA) or unwarrantable failure citations involving high negligence or reckless disregard (MSHA), evaluation for criminal referral will become more common.

The documents sought by the agencies during inspections and accident investigations typically include requests for email correspondence concerning maintenance, purchase orders, capital improvement requests (and denials), contracts with subcontractors and temporary agencies, near miss reports, safety committee meeting minutes, and even self-audits. These are all requested to help the prosecuting agencies determine whether a pattern or practice of violations occurred, whether hazardous conditions or

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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

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equipment defects were known to management, whether inspection reports or training records are fraudulent, and whether problems affecting safety or health that were brought to management's attention were dismissed without investigation or resolution.

If a paper trail exists, it is increasingly likely in serious accident cases that personal prosecutions may arise and reach into the corporate suite. A Memorandum of Understanding ("MOU") released in December 2015 between the U.S. Departments of Labor and Justice aimed at improving the government's ability to bring criminal prosecutions for workplace safety violations under the OSH Act, the Mine Act, the child labor law provisions of the Fair Labor Standards Act, federal statutes barring obstruction of justice, conspiracy and witness tampering statutes, and even under environmental laws that work in tandem with OSHA laws to protect the public from hazards that also threaten worker safety (criminal environmental violations are prosecuted as felonies).

The MOU specifically notes that prosecutions will be focused "on the ones making the decisions that lead to the deaths of others, including people in the corporate office, managers, and supervisors in the field." Even in the absence of a fatality, criminal prosecutions can be brought under the Mine Act for high negligence or reckless disregard violations (no injury required) and under both the Mine Act and OSH Act for false statements, falsified documents (e.g., training records and workplace exams), destruction of documents, and giving advance notice of, or otherwise impeding, inspections and investigations.

Although Congress was presented with legislation to increase criminal penalties under both federal safety laws (the pending Protecting American Workers Act and the Byrd Mine Safety Act), no action is expected as we head toward the November elections. The outcome of both the presidential and congressional elections will largely influence whether any changes are made to strengthen the existing sentences for willful safety and health violations legislatively next year. In the meantime, state governments may be poised to fill the prosecutorial gap.

A 2016 report and prosecutorial guidance manual by the Center for Progressive Reform (CPR), Preventing Death and Injury on the Job: The Criminal Justice Alternative in State Law, calls attention to this option.

The full report is available at www.progressivereform.org. It was written by CPR Scholars, who are professors at educational institutions and law schools including the state universities of Maryland and Texas, Wake Forest, and University of Buffalo, SUNY.

The CPR report begins by recounting the criminal prosecution of the Pyro Products' president in 1972, following an explosion that killed multiple workers, in which the state of Massachusetts succeeded in convicting the official of involuntary manslaughter, for which prison time was served. It adds: "Such accountability is rare ... Many [workplace deaths and injuries] are due to their employers' egregious disregard for worker health and safety." Between 1970 and 2013, federal prosecutors only pursued criminal charges in 88 OSH Act cases (MSHA referrals for criminal prosecution are far more common because of the mandatory inspections of every mine, which help to establish patterns of violations and more frequently reveal records falsification).

CPR reports that while progress is slow at the federal level in ramping up criminal indictments, workers and advocacy groups are turning to the states, which can prosecute cases involving both fatalities and serious injuries. State indictments for negligent homicide, involuntary manslaughter, reckless endangerment, and assault and battery charges can result in state felony sentences. It notes that state prosecutorial efforts in California, New York, Illinois, Massachusetts and Michigan have been "remarkably successful." The remainder of the report is a manual to help local prosecutors focus on bringing charges against the business entity as well as responsible executives and managers. It also serves as a handbook for advocates who wish to lobby for heightened state prosecutions of workplace crimes.

Nearly 4,700 workers died on the job in 2014 alone. All of these cases potentially could have resulted in criminal exposure for agents of management who knew about safety or health issues and failed to timely implement corrective action or who disregarded concerns raised by workers. If the same track record holds true in the future, and the MOU does motivate the agencies to build stronger cases through investigation (more training is coming) and prosecute them more aggressively at the federal and state levels, the Blankenship prosecution will be just the beginning. Heightened penalties can be

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expected as U.S. Justice Department attorneys get more experienced in building workplace crime cases.

Any workplace injury or illness event that requires notification to MSHA (death or injuries with a reasonably potential to result in death) or OSHA (fatality, single hospitalization of an employee, amputation injury or loss of an eye) could have the potential to turn into a criminal case, and significant document requests and records review can be expected. Counsel should be consulted immediately, so that investigative reports and other notes can be covered under legal privilege and interviews with any management agents who have legal exposure can be properly defended.

Plant Railroads: Who has Jurisdiction

By: Gary Visscher, Esq.

Many mining and construction materials companies lease or use railroad tracks which run across or next to their property to transport materials to and from their operation. The question sometimes arises, which federal agency has jurisdiction over safety issues on and around those railroad tracks.

Generally, the Federal Railroad Administration (FRA), part of the U.S. Department of Transportation, has jurisdiction over railroads. By statute the FRA may exercise jurisdiction over any part of the "network of standard gage track over which goods may be transported." However, the FRA has excluded some railroad operations from its rules and enforcement. "For example, all of FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation (i.e. "plant railroads"), such as those in steel mills that do not go beyond the plant's boundaries." 49 C.F.R. Part 209, App. A.

Where the FRA does exercise jurisdiction, OSHA's jurisdiction is pre-empted because of section 4 (b)(1) of the OSH Act. ("Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies…exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.") Conversely, if FRA does not exercise jurisdiction, even if it could do so, OSHA's jurisdiction to enforce its standards and the general duty clause is not pre-empted. A recent decision by the Occupational Safety and Health Review Commission (*Conrad Yelvington Distributors Inc.*, 3/30/2016) addressed this question. *Conrad Yelvington Distributors, Inc.* (*Conrad Yelvington*) was contracted to provide aggregate for the construction of a commuter rail station and rail tracks in Sanford, Florida. Conrad Yelvington maintained a terminal approximately 1 ½ miles from the construction site, and as needed brought aggregate to the construction site by rail car.

There were 3 tracks running through the construction area, two of which were used by CSX and Amtrak. The third was used only by Conrad Yelvington for delivering aggregate to the site. Traffic on the two tracks used by CSX and Amtrak was controlled by a dispatcher and by radio. The separate track used only by Conrad Yelvington was not controlled and did not have a dispatcher or radio frequency or other means of communicating when a train was using the track.

In the early morning darkness of October 23, 2013, a Conrad Yelvington crew was moving a 10-car train loaded with ballast stone to the construction site. Although the train was moving at only 5 mph, unknown to the train's crew a "derail" had been placed on the track. Hitting the derail caused 3 cars to overturn, including the lead car on which the conductor was riding. He died as a result of being crushed when the rail car and its load overturned.

OSHA cited Conrad Yelvington under the "general duty" clause, section 5 (a)(1), of the OSH Act. Conrad Yelvington subsequently argued before the Occupational Safety and Health Review Commission that OSHA's jurisdiction was pre-empted because the railroad tracks where the accident occurred were under the jurisdiction of the FRA. The Administrative Law Judge analyzed FRA's regulations, and found that although the FRA could assert jurisdiction over the tracks involved, it had specifically exempted "plant railroads" from its jurisdiction. The ALJ also agreed with the Secretary of Labor that the tracks in question could be considered "plant tracks" and therefore OSHA had jurisdiction.

On review by the Commission, the Commission requested the FRA to state whether it would assert jurisdiction. The FRA submitted an amicus brief to the Commission stating that "as a policy matter, it has chosen to exclude 'plant railroads' from regulation." The Commission cited the FRA's brief that it "considers an entity to be a plant railroad when the track on which it operates: (1) is leased from a general system railroad for the entity's exclusive use; (2) is only used by the entity and general system railroad for moving rail cars shipped to or from the plant; and (3) is immediately adjacent to the plant." Based upon FRA's representation that it eschewed jurisdiction in this situation, the Commission affirmed OSHA's jurisdiction over the cited conditions.

While the OSH Act provides that only one or the

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other, FRA or OSHA, has jurisdiction, the same may not be the case under the Mine Act. In a June 2013 case, *CML Metals*, 35 FMSHRC 1962 (ALJ, June 21, 2013), the administrative law judge held that a railroad load-out area adjacent to an iron ore mill where the rail cars were loaded, and the railroad "spur" that ran for 18 miles and connected the load-out area to a Union Pacific main line, was a "mine" within the definition of the Mine Act, and therefore under MSHA's jurisdiction.

CML Metals argued, among other things, that MSHA's jurisdiction was pre-empted because the FRA had jurisdiction over the rail spur. In fact, the FRA had previously inspected the spur as well as rail cars and locomotives that used the spur. On the other hand, MSHA did not inspect the spur and rail cars prior to May 2013. The judge, however, rejected the pre-emption argument, stating that FRA's jurisdiction did not preempt MSHA's jurisdiction because the Mine Act did not include an "express indication of preemption of MSHA's jurisdiction."

Any company with railroad tracks traversing its property should ensure that it knows what agency will assert jurisdiction if an injury-producing event occurs. Without proper inspections and training of staff, even a minor injury could produce additional enforcement efforts.

OSHRC Rules Supervisor's Misconduct Cannot Be Imputed To The Employer For Unforeseeable Misconduct

By: Brian Yellin, Esq.

On February 2, 2016, the Occupational Safety and Health Review Commission (Commission) ruled in *Sec. of Labor v. S.J. Louis Construction of Texas*, OSHRC Docket No. 12-1045, that the Secretary had not established that S. J. Louis Construction of Texas (SJL) had knowledge of a construction supervisor's misconduct, which lead to a double fatality, because the misconduct was not foreseeable.

SJL is a large underground utility contractor that at the time of the subject case was involved with the reconstruction of sewer distribution lines as part of a waste water treatment rehabilitation project.

On November 3, 2011, two SJL employees entered a manhole leading to an active sewer line and died from an overexposure to hydrogen sulfide (H2S) and asphyxiation due to an oxygen deficient atmosphere. One of the two decedents was the crew leader who entered into the manhole in order to address neighborhood complaints of "fumes." Once inside the manhole, the crew leader became incapacitated and informed his two crew members (brothers) that he was not able to get out of the manhole and needed help. Crew member A told crew member B to retrieve a rope in order to rescue the crew leader from the manhole. Unfortunately, by the time crew member B secured the rope and returned to the manhole, he observed crew member A lying face down inside the manhole. The crew leader and crew member A were extricated from the manhole by the fire department and were declared dead on the scene.

Following OSHA's investigation of this double fatality, OSHA issued three "Serious" citations to SJL alleging violations of the Confined Space standard for general industry, 29 CFR §1910.146. Item 1 alleged a violation of §1910.146(d) for failing to ensure a permit-required confined space was evaluated and measures implemented to prevent unauthorized entry; Item 2 alleged a violation of §110146(f) for failing to provide the required information for compliance with entry permit and authorized entry; and Item 3 alleged a violation of §1910.146(k)(1)(i) for failing to evaluate a prospective rescuer's ability to respond to a rescue where there are known hazards.

SJL successfully argued that the Secretary improperly issued citations alleging violations of §1910.146 because it was engaged in purely construction-related activity whereas §1910.146(a) clearly states "this section does not apply to agriculture, to construction, or to shipyard employment…

It is important to note that the Administrative Law Judge (ALJ) determined that even though SJL developed and implemented a written "Confined Space Entry Program," it did not render the Confined Space standard applicable for enforcement purposes. Rather, SJL used the framework of §1910.146 to create a confined space entry program for its construction work in light of the fact that the Secretary had not yet issued a final rule governing confined spaces in the construction industry.

Prior to the trial, the ALJ permitted the Secretary to amend the citations to allege, in the alternative, a serious violation of OSHA's General Duty Clause, §5(a)(1) of the OSH Act. More specifically, the

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Secretary alleged:

> S.J. Louis exposed its employees to the recognized hazards of asphyxiation when it allowed its employees to enter sewer manholes, a permit required confined space, without taking necessary precautions to ensure safe entry and rescue.

In order for the Secretary to sustain a violation of the General Duty Clause, he must prove each of the following elements: 1) there was condition in the employer's workplace that constituted a hazard to employees; 2) the employer or employer's industry recognized the hazard; 3) the hazard was causing or likely to cause death or serious physical harm; and 4) feasible means existed to eliminate the hazard.

SJL argued that it did not have the requisite employer knowledge of the hazard to which its employees were exposed. In order to establish the employer knowledge element of the General Duty Clause, the actual or constructive knowledge of a supervisor is normally imputed to his employer based on a supervisor's "assumed delegated authority."

In this case, the violative conduct was committed by the crew leader who served in a supervisory capacity. When the violative conduct is committed by a supervisor, the Secretary has the burden of showing the supervisor's misconduct was "foreseeable" in order to imput his knowledge to the employer.

The ALJ determined that since the instructions given to the crew leader by his project manager, i.e. check the manhole because of neighborhood complaints of "fumes," were vague and inadequate, it was foreseeable that the crew leader would have entered the manhole without adequate precautions. Thus, the ALJ determined that the Secretary had met his burden of proof with respect to the employer knowledge element.

SJL raised the affirmative defense of employee misconduct and argued that the crew leader's entry into the manhole was unauthorized because the crew leader was not an authorized confined space entrant and he did not possess the requisite confined space entry equipment.

In order to establish the affirmative defense of employee misconduct, the employer must show the following: 1) it has established work rules designed to prevent the violation; 2) it had adequately communicated these rules to its employees; 3) it had taken steps discover violations; and 4) it effectively enforced the rules when violations are identified.

Additionally, where a supervisory employee is involved, the proof of unpreventable employee misconduct is "more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision."

The ALJ determined that a supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax, and the fact that a supervisor would breach his company's safety and health policy is strong evidence that implementation of its safety program is also lax.

The ALJ rejected SJL's employee misconduct defense in part because the project manager's instruction to the crew leader to evaluate the manhole was vague and ambiguous. The ALJ also found that there was no record of safety audits being performed by SJL, or employees that violated safety rules were subject to disciplinary action. The ALJ upheld the Secretary's General Duty Clause citation.

SJL appealed to the Commission arguing in large part that it did not have the requisite knowledge of the hazard and the crew leader's actions constituted unpreventable employee misconduct.

The Commission maintained that the Secretary must prove that the employer knew, or with the exercise of reasonable diligence, should have known of the hazardous condition constituting the violation. It reasoned that in order to assess reasonable diligence, several factors must be considered including: 1) an employer's obligations to implement adequate work rules and training programs; 2) adequate supervision of employees; 3) anticipation of hazards; and 4) taking measures to prevent violations from occurring.

Although actual or constructive knowledge of a supervisor can be imputed to the employer, the Commission maintained that in cases involving a supervisor's knowledge of his own misconduct the Secretary must also prove that the supervisor's participation in the alleged misconduct "was foreseeable by showing that the employer's safety policy, training, and discipline are adequate."

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SLJ argued that the ALJ erred in concluding that constructive employer knowledge has been established based on the project manager's inadequate instructions to the crew leader. Rather, SLJ maintained, and the Commission agreed, that the trial record showed that the instructions provided by the project manager to the crew leader were reasonable because the company knew about the crew leader's work history, training, demonstrated understanding of confined space hazards, ability to perform his job, and his spotless safety record.

Additionally, the Commission concluded that SJL had established work rules in its written confined space program designed to prevent unprotected entry into a permit-required confined space.

The Secretary claimed that SJL's confined space program was deficient because there were numerous instances where confined space entry permits contained incomplete information. However, the Commission dismissed this argument by asserting that SJL's field safety supervisors reviewed the completed confined space entry permits, immediately noted whether the permits contained any deficiencies, and discussed with the employee the importance of properly documenting and completing the confined space entry permit.

Finally, the Commission concluded that the crew leader's conduct was contrary to his usual practice and training, and more importantly was inconsistent with his demonstrated understanding of confined space hazards before the fatal accident.

The Commission ruled that the crew leader's misconduct was not foreseeable, and as a result, the Secretary failed to establish that SJL had knowledge of the violative conduct. Consequently, the Commission vacated the General Duty Clause citation.

OSHA Silica Rule Attracts Court Challenges and Congressional Attention

By: Gary Visscher, Esq.

Our previous (April 2016) newsletter included a summary of OSHA's recently-issued standards for general industry, maritime, and construction regarding occupational exposure to respirable crystalline silica. The standards were issued on March 23, 2016. The effective date for the rule is June 23, 2016, however the compliance date for most parts of the general industry and maritime standard is June 23, 2018, while the construction standard has only a one-year period for compliance – June 23, 2017.

The new standards set a "permissible exposure limit" of 50 micrograms per cubic meter of air (50 $\mu g/m^3$) and an "action level" of 25 $\mu g/m^3$. These levels compare to the current exposure limits of approximately 100 $\mu g/m^3$ for general industry and 250 $\mu g/m^3$ for construction. In addition, the new standards include requirements for exposure assessment, recordkeeping, engineering and work practice controls, written programs, regulated areas, and medical surveillance that are not included with the current exposure limit.

Several lawsuits were filed in the U.S. Courts of Appeals challenging the new standard. The lawsuits were subsequently consolidated and will be heard by the Court of Appeals for the D.C. Circuit. Among the issues on appeal will likely be the feasibility of the standard, the reliability and accuracy of detecting respirable silica at the levels prescribed in the standard, and the soundness of health risk assessments underlying the prescribed levels.

Further, the standard was challenged by a number of labor unions which sought inclusion of additional employee protections. It is likely that the outcome of the lawsuits will not be known for some time. For example, a recent appeal of MSHA's standard on the exposure limit for coal dust was decided by the U.S. Court of Appeals for the 11th Circuit about 21 months after the standard was issued.

In addition to the proceedings in the U.S. Court of Appeals, on April 19, the Workforce Protections Subcommittee of the House Education and Workforce Committee held a hearing on the new silica rule at which many concerns, both for and against the new rule, were aired. There may be an effort to pass legislation to stop the rule, either a resolution of disapproval under the Congressional Review Act or a "rider" to the appropriations for the Department of Labor. Either course is subject to Presidential veto.

While these proceedings continue, employers who may be affected by the rule should be assessing how the new rule affects their work places and work procedures and practices. Please contact us if you have questions about the rule or the effect of the developments described above.

OSHA's Electronic Recordkeeping Final Rule Analysis

By: Adele L. Abrams, Esq., CMSP

On May 12, 2016, the Occupational Safety & Health Administration (OSHA) published its final rule modernizing injury and illness (I/I) data collection and requiring that most OSHA-regulated employers submit their mandatory OSHA forms on an annual basis, effective July 1, 2017. The forms that must be submitted vary by company size and type, as explained below. The original proposal would have required larger employees to submit data on a quarterly basis, rather than annually. OSHA's regulations require employers with more than 10 employees in most industries to keep records of occupational I/I at their establishments, but only those with 20 or more workers are affected by the e-Recordkeeping requirements in the new rule. It does not change the recording criteria or definitions that were previously codified in 29 CFR Part 1904.

While employers will have to file data annually through the forthcoming electronic data entry system, they will still be obligated under 29 CFR Part 1904 to maintain the OSHA Forms 300, 300A and 301, to make them available to inspectors upon request, and to post the Form 300A (Annual Injury and Illness Summary Log) in the workplace between February 1st and April 30th of the following calendar year.

The reports must cover injuries and illnesses affecting full and part time employees, as well as seasonal workers and temporary workers who are supervised in their work activities by the host employer. All of these workers count toward the "total" number of employees, for purposes of the reporting thresholds contained in the rule. OSHA clarified that if an enterprise or corporate office has control over one or more establishments required to electronically submit their data, the corporate office can collect and electronically submit the information for its establishments.

In addition to the electronic reporting requirements, the rule adds provisions clarifying employees' rights to report I/I to their employer without fear of retaliation, supplementing the rights provided by Section 11(c) of the Occupational Safety & Health Act of 1970 (OSH Act). The rule clarifies that an employer must have a reasonable procedure for reporting work-related I/I that does not deter workers from filing such reports. This portion of the rule applies in all OSHA-regulated workplaces, effective August 10, 2016. OSHA said that it is applying "behavioral economics" to improve workplace safety. Assistant Secretary of Labor, Dr. David Michaels, stated: "Our new reporting requirements will 'nudge' employers to prevent workplace injuries and illnesses to demonstrate to investors, job seekers, customers and the public that they operate safe and well-managed facilities." Currently, employers can obtain data from OSHA and the Bureau of Labor Statistics about injury and illness rates by industry sector, but not by comparison to other specific employers. OSHA maintains that the new rule will enable employers to benchmark their safety and health performance against industry leaders, and can lead to improvement of safety programs. All data will appear, in a searchable format, on the agency website, www.osha.gov.

Many commenters expressed concern that while good employers will strive to meet the new rule and comply, the worst employers will be encouraged by the publication of the data to report even fewer incidents. Some raised questions about the appropriateness of requiring I/I data to be posted, regardless of whether the case arose from worker negligence. Others stressed that injury and illness rates are not intended to be used as a performance measure, and that the new regulation represents a "step backward" for those who have worked to move their organizations toward measurement using leading indicators, which better indicate how to avoid injuries and illnesses. The measure was praised by labor groups, which said that the e-Recordkeeping rule will help both union and management officials efficiently identify workplace hazards and unsafe conditions and to take action to prevent future injuries.

The U.S. Chamber of Commerce claimed that OSHA lacks statutory authority to compel submission of the data or to make it publicly available, and said that "shaming employers" will not lead to better results. The agency responded that Sections 8 and 24 of the OSH Act require employers to make available records that the Secretary of Labor prescribes by regulation, and that OSHA is required by statute to compile, analyze and publish injury data. While OSHA has not previously made I/I data available by employer name, nor searchable on its website by company, its sister agency MSHA (Mine Safety & Health Administration) has done so for years, albeit in a more limited manner.

In addition, Section 11(c) of the OSH Act provides workers with protection against retaliation or discrimination for engaging in protected activities, which has always included the right to (*Con't page 11*).

EAJA: Just Because You Won Doesn't Mean MSHA Was Wrong

By: Sarah Korwan, Esq.

A judge has denied a claim for $52,500 by a contractor at an underground silver mine for attorneys' fees and expenses it incurred in successfully defending a 104(d) citation, issued by the Mine Safety and Health Administration, which alleged the contractor engaged in acts constituting an unwarrantable failure and high negligence.

The underlying case concerned Citation No. 8597320 issued for an alleged violation of 30 CFR 57.9100(a), which requires mines to establish and follow right-of-way procedures to ensure the safe movement of mobile equipment. The citation alleged that Lowell Hicks, Traylor's production supervisor, was injured by the roadheader on a Bobcat excavator when the boom of the excavator was inadvertently activated by the excavator operator as he backed out of a mucked out area. After Hicks and the excavator operator, Michael Reagan, determined that no further work was necessary, Reagan confirmed that all miners were clear of the excavator and began to tram backwards.

At this time, Hicks walked in by the left side of the excavator. Reagan did not see Hicks advance and, as the excavator moved over uneven ground, Reagan turned to his right to lock behind him and inadvertently hit the swing lever, causing the boom to swing and strike Hicks. Hicks was evacuated from the mine and taken to a nearby hospital to address his injuries.

Subsequent to the accident, MSHA inspector David M. Sinquefield traveled to the mine to take photos and measurements of the scene of the accident. He did not interview miners, but did interview Hicks at the hospital the following day.

Traylor Mining, LLC filed a claim under the Equal Access for Justice Act for recovery of litigation costs following Administrative Law Judge Richard W. Manning's decision, issued in October, 2015, to vacate the unwarrantable failure designation, modify the violation to a 104(a) citation, reduce the negligence designation from high to moderate, and reduce the penalty from a special assessment of $52,500 to a regular assessment of $1,000. In his ruling, ALJ Manning rejected MSHA's claim that Traylor management knew the condition was extensive, instead finding that management was not put on sufficient notice of the violative condition and properly enforced safety standards. However, the ALJ did find that several factors supported the unwarrantable failure decision, including a high degree of danger posed by the condition, the obvious nature of the violation, and the operator's imputed knowledge that Hicks' position posed a danger.

At hearing, Traylor conceded the violation, the S&S designation, and gravity-related designations, but contested the unwarrantable failure designation, the high negligence designation, and the $52,500 special assessment. As noted above, Traylor based its application for EAJA fees on the ALJ's modification of Citation No. 8597320 from a 104(d) to a 104(a) citation, modification of the negligence designation from high to moderate, and reduction of the penalty. Specifically, Traylor argued that the Secretary's high negligence designation relied upon the inspector's incomplete investigation and incorrect interpretation of Hicks' statements made during his post-accident interview.

MSHA contended that its enforcement action had been substantially justified, and challenged Traylor's application as a prevailing party, Traylor's eligibility under the EAJA to receive attorney's fees, and Traylor's rationale for raising the fees to be awarded above the statutory limit. However, the Secretary did withdraw its contest of Traylor's eligibility in light of additional documentation the applicant provided, while, at the same time, maintaining its position that he was substantially justified because the ALJ found elements of an unwarrantable failure existed.

ALJ Manning found that Traylor was an eligible prevailing party under 29 U.S.C. § 2704.105(a) because it established that it had a net worth of less than $7 million, fewer than five hundred employees, and was the only party to which the underlying litigation bestowed significant benefits. However, the ALJ did not find facts sufficient to justify an EAJA award. Instead, he found that the Secretary had met its burden of proof that it was substantially justified in the underlying litigation.

Specifically, the ALJ found that the Secretary provided facts that reasonably justified the inspector's determination that the violation was the result of an unwarrantable failure on the part of Traylor. Although there may have been a misinterpretation of information by the inspector, it did not invalidate the entire investigation. Furthermore, although the ALJ found significant mitigating factors, there were factors which supported an unwarrantable failure, most

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notably the fact that Hicks placed himself in front of the blade between the excavator and the rib, the obvious nature of the violation, the operator's imputed knowledge that Hicks' position posed a danger, as well as others.

The ALJ evaluated the Secretary's high negligence designation and, while he modified to moderate negligence, he found the Secretary substantially justified. Considering the totality of information presented by both parties, the ALJ credited Traylor's witnesses in finding that the violation was an isolated incident. However, AJL Manning found that such modification was not sufficient to find the Secretary's high negligence determination unjustified.

Regarding the proposed Special Assessment, the AJL noted that a serious injury occurred as a direct result of the violation. In addition, because the violation was committed by the supervisor of the crew, the citation was designated as an unwarrantable failure to comply with a safety standard. The ALJ found that these factors provided a reasonable explanation. The ALJ did not discuss the arguments regarding the fee claims since he found the EAJA award was not appropriate.

Quoting Commission Judge McCarthy, "[l]itigation is a crapshoot. The parties relinquish control, and when the dust settles, reasonable minds can differ about the legal import of the facts established and the cogency of the legal arguments advanced." *McGruder Limestone Co., Inc.*, 36 FMSHRC 3288 (Dec. 2014)(ALJ). Accordingly, in this case, given the totality of information, the ALJ found that the Secretary's "position and proof" could have satisfied a reasonable person, and that the Secretary met its burden in establishing that its position was substantially justified.

2015: The Safest Year in Mining History?

By: Ryan W. Horka, Esq.

According to preliminary data, 2015 was the safest year in mining history, both in terms of deaths and injuries. Not only did the number of fatalities drop to 28, down from 45 in 2014, but the fatal injury rate – based upon total number of hours of miner exposure – fell to .0096 per 200,000 hours worked. For comparison, the fatal injury rate was .0144 in 2014, and .0110 in 2011 and 2012. In the metal/nonmetal industry, the number of fatalities and the fatal injury rates dropped to historic lows. The 2015 metal/nonmetal fatal injury rate dropped to .0085, close to the all-time low of .0079 set in 2012.

The all-injury rate also dropped significantly across the board in 2015, setting a new all-time low of 2.28. The coal industry's all-injury rate dropped to 2.88 – the first time it has ever fallen below 3.0 – and metal/nonmetal rate fell to a new all-time low of 2.01. In terms of compliance, there was an 11 percent reduction in the number of citations and orders issued, which, even taking into account the fact that the number of miners and mining operations were down in 2015, indicates an improvement in compliance. Final data will be released in July.

MSHA's Material Storage & Safety Warehouse Alert

By: Tina M. Stanczewski, Esq., MSP

In an effort to maintain continued contact with the mining community, MSHA is issuing monthly alerts. The May alert concerned Material Storage. The alert highlighted a driver who fell from a stack of pallets and died. The alert explained that proper housekeeping, examinations, elimination of risks can all reduce injuries and death. Operators are encouraged to review the alert and follow best practices. Some of the best practices include:

- Examine the warehouse on each working shift. Repair or correct any unsafe equipment or conditions.
- Establish safe procedures to accomplish warehouse tasks before beginning work.
- Identify and eliminate or control all hazards associated with the work to be performed.
- Miners must be trained on the task to be performed.
- Delivery workers must receive site-specific training unless accompanied by an experienced miner.
- Do not assign a person to work alone in areas where hazardous conditions could endanger employee safety, and account for everyone at the end of the shift.
- Keep aisles, travelways and exits clear and free of slip, trip and strike-against hazards.

The full alert can be found here Alert.

A Full Day of Good Safety and Health Ideas

By: Michael Peelish, Esq.

Thank goodness for the National Institute for Occupational Safety and Health (NIOSH) and the Mine Safety and Health Research Advisory Committee (MSHRAC). MSHRAC met near Pittsburgh on May 10, 2016 to receive presentations by a slew of NIOSH researchers. While the presentations were fast and furious as viewed from a high level, they were full of important and critical research activities that the mining industry needs. Setting itself up for success, defined as delivering results for the "miner", NIOSH's reorganization in 2015 has led to a focused set of research priorities and a better process for how those priorities are established. A more regional and commodity approach provides for completing current research activities and identifying emerging trends. To their credit, MSHRAC and NIOSH were keenly aware of how the mining industry fundamentals have rapidly changed over the last several years, and how that may shift the priorities.

A good bit of the day was spent on strategy and process and how the new organization was functioning. NIOSH reiterated its seven strategic goals to improve mine workers' safety and health and noted these would be synthesized to fewer goals next year. These goals include (1) eliminate respiratory diseases by reducing exposure to airborne contaminants, (2) reduce noise induced hearing loss, (3) reduce risk of musculoskeletal disorders, (4) reduce risk of traumatic injuries, (5) reduce risk of mine disasters, improve the post-accident survivability of miners and critical systems, and enhance the safety and effectiveness of emergency responders, (6) reduce ground failure fatalities, and (7) reduce adverse health and safety consequences through effective interventions with new technology.

NIOSH recognizes that it is reliant on data and that it needs to be more proactive in identifying trends and trying to get ahead of the curve. In that vein, NIOSH identified emerging trends in the U.S. Mining Industry to include: more underground and deeper mines; greater percentage of coal production from the Illinois and Powder River basins; increased automation; changing workforce demographics; and alternative fuels and battery-powered equipment. MSHRAC brought forth its expertise and suggested during discussion that NIOSH explore other trends such as defining and managing Big Data (for instance, following workers throughout their careers); use of sensor technology to make mines "smart"; how robotics can be deployed in mine rescue or examination of highwalls; better collaboration with other groups such as NFPA; and how we can learn from what other countries are doing. One of the more interesting questions posited by NIOSH, but without a conclusive response, was whether NIOSH should conduct safety and health research in sectors such as oil and gas, tunneling and smelters and refineries.

Some other notable items raised during the meeting involved NIOSH's use of a Burden, Need, and Impact approach for determining funding priorities; that the data would suggest greater emphasis on research for Stone, Sand and Gravel operations particularly in the small mines area; and that NIOSH is facing a workforce development cliff as it has a tremendous number of funded vacancies and more vacancies to come based on employees that can retire within a few years.

Some notable recent research successes were appropriately touted by NIOSH including the Continuous Personal Dust Monitor, LED lighting for roof bolting machines, Diesel Particulate Matter Monitor; Coal Dust Explosibility meter, ErgoMine mobile auditing app, and others. There were also some issues that remain unresolved that will impact the mining industry including MSHA's desire to improve SCSR technology beyond what manufacturers are willing to pursue, that the coal workers' health surveillance program continues to find a high prevalence of CWP and PMF in miners, and that refuge chambers will soon become obsolete under the regulation. It was suggested that NIOSH might develop an objective standard to determine the integrity of these systems so as to extend the life span beyond ten years.

NIOSH and the MSHRAC are doing the fundamental research that industry is unable to fund and conduct especially in light of the Alpha Foundation project coming to an end. Even though the number of workers involved in mining is small compared to general industry, the economic impact of the mining sector is huge and cannot be forgotten. As the saying goes, "if it is not grown, it is mined". As a nation, we can only hope to maintain mining's noble position within our society in order to retain and attract those individuals who want to be part of a great tradition.

Electronic Recordkeeping, Con't.

report injuries and illnesses to the employer.

OSHA plans to use the data it receives from employers to target both enforcement resources (e.g., the site-specific targeting approach to programmed OSHA inspections) and to offer compliance assistance at establishments where workers are at risk. The data collection effort will also facilitate research on occupational injuries and illnesses and enable the government to identify emergent hazards that are harming workers, so that interventions can occur.

OSHA maintains that making the data available in an open format will:

- Encourage employers to increase their efforts to prevent worker injuries and illnesses, and "compelled by their competitive spirit," to race to the top in terms of worker safety; and
- Enable researchers to examine these data in innovative ways that may help employers make workplaces safer and healthier.

The outcome of the e-Recordkeeping initiative will be creation of the largest, publicly available, data set on occupational injuries and illnesses, more study of injury causation, and evaluation of the effectiveness of I/I prevention activities. OSHA has pledged that it will scrub personally identifiable information from the data before it is made publicly available. The release of personal information, or the ability to "reverse engineer" accident information in order to identify the victim, was among the concerns expressed by commenters during the rulemaking process.

Although the e-Recordkeeping portion of the final rule becomes effective January 1, 2017, the first reports will not be due until July 1, 2017, at which time all covered employers will have to submit the Form 300A (Summary of Work-Related Injuries and Illnesses) only. In calendar year 2018, establishments with 250 or more employees will have to submit Forms 300A, Form 300 (Log of Work-Related Injuries and Illnesses) and Form 301 (Injury and Illness Incident Report) by July 1, 2018.

Establishments with between 20-249 employees that are classified by NAICS code in certain industries that have historically high rates of occupational injuries and illnesses will have to file electronically, but their submission requirement is limited to the summary, Form 300A. These include all employers within that size range involved with agriculture, forestry, fishing, hunting, utilities, construction, manufacturing, and wholesale trade. Subsectors of other industries are covered as well , and the expansive list is included in Appendix A to subpart E of Part 1904. The e-Recordkeeping requirements are codified at 29 CFR 1904.41.

Beginning in 2019, the submission deadline for filing the mandated reports will move to March 2nd (instead of July 1st). The rule retains the provision that permits OSHA to collect information from other employers, who will not submit the information to the agency routinely electronically, upon written notification from OSHA or its designee. States that manage their own OSHA programs (22 states cover private sector employers and are designated as "state plan states") will have to adopt requirements that are substantially identical within six months from May 12, 2016.

With respect to the workers' protections, the rule contains three provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – that are intended to encourage complete and accurate reporting of workplace injuries and illnesses:

- Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA's Job Safety and Health – It's the Law poster (www.osha.gov/Publications/poster.html).
- An employer's procedure for reporting work-related injuries and illnesses must be "reasonable" and must not deter or discourage employees from reporting.
- An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses.

During the briefing, Dr. Michaels made it clear that incentive programs that deprive a worker, or his work unit, from receiving a bonus or other prize because an employee suffered an injury would be considered as interference with the worker's protected rights under Section 11(c) of the OSH Act. Similarly, disciplinary programs that punish all workers who are injured, regardless of fault, or which impose harsher discipline on workers who are injured than is imposed on workers who violate the same safety rule but are uninjured, would be a violation. Workers who are retaliated against in violation of their whistleblower rights have 30 days to file a complaint with OSHA, which will prosecute the case on the employee's behalf.

If incentive and discipline programs resulted in underreporting of injuries, citations and civil penalties will be issued. On March 12, 2012, OSHA issued a

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memorandum to its Regional Administrators advising them to critically scrutinize workplace incentive and discipline programs to see if they interfered with reporting of injuries and illnesses, and framed the issue as one of whistleblower rights as well as compliance with Part 1904.

OSHA stresses that the rule does not require collection of additional data and said that the economic burden of transmitting the data to OSHA will cost less than $15 million per year. It anticipates that the rule covers only about 500,000 of the nation's 7 million worksites. Costs for the smaller establishments will total $4.6 million for electronic submission, while costs for the larger employer category will reach $7.2 million per year. While OSHA could not quantify the annual benefits of the final rule, it believes that these exceed the annual costs, by helping to assure that workers are better protected through prevention of I/I and by promotion of complete and accurate reporting.

The final rule is expected to result in litigation, but OSHA was successful in publishing the rule prior to May 23, 2016, which insulates it from repeal by Congress using the Congressional Review Act.

OSHA's Details the Issues for SBREFA Panel Under Proposed PSM Rule

By: Tina M. Stanczewski, Esq., MSP

On May 4, 2016, OSHA released additional supporting documentation for the proposed changes to the Process Safety Management standard from the SBREFA panel. These included an issues document, powerpoint, and background document. PSM was adopted by OSHA in 1992. In December 2013 OSHA issued a Request for Information listing the changes that it planned on implementing. This new release details the issues to be discussed by the SBREFA panel.

The exemption for agricultural retailers and the fertilizer industry remains at issue. It appears OSHA will still pursue revoking the exemption. Overall, the potential areas for change include:

- Atmospheric storage tanks: OSHA wants to change the language in 1910.119(a)(a)(ii)(B) to make clear that it applies only to processes to NAICS 4247 Petroleum and Petroleum Products Merchant Wholesalers.

- Oil & gas well drilling, servicing, and production: OSHA proposes to remove the exemption for oil and gas well drilling operations, regardless of threshold quantities present. In addition, it wants to complete the economic analysis for oil and gas production.

- Chemical reactivity: OSHA wants to add language to § 1901.119(a) to extend the coverage to processes with a listed functional group, if the heat of reaction is above 100 kcal/mol or if the reaction generates a toxic product and the substance is at the threshold quantity.

- Safer technology and alternatives: OSHA proposes to require employers use the hierarchy of controls in considering safer alternatives and technology when identified hazards result in an employer-specified level of risk.

- Additions to Appendix A Chemicals: OSHA proposes adding several chemicals to Appendix A including ammonium nitrate, diethyl telluride, and sodium hydroxide.

- Dismantling & disposal of explosives: OSHA wants to extend PSM to include coverage for the dismantling and disposal of explosives.

- Defining/updating RAGAGEP: OSHA would require employers to conduct a periodic review of current RAGAGEP and implement updates.

- Mechanical integrity: OSHA proposes to expand the definition to include all equipment deemed critical.

- Employee participation: OSHA wants to implement a regular system of employee input and management, non-management, and contract employee dialogue.

- Emergency Planning: OSHA proposes to require emergency planning to foster coordination with local response, including: annual meetings with local responders, emergency drills, evaluation of local emergency response capabilities.

- 3rd Party audits: OSHA wants to require audits to be done by independent third parties.

- Stop work authority: OSHA believes a stop work authority program should be implemented.

- Root cause analysis: Any incident investigation should have a root cause analysis.

- Process hazard analysis management sign-off: OSHA would require companies to ensure hazards in the PHA are adequately addressed, if management decides not to implement or make modifications based on PHA team findings.

- Written PSM management system: a requirement that employers develop and implement a written PSM

- Management system: this would include written procedures for all elements specified in the standard, along with a records retention policy.

OSHA PSM, Con't.

- Evaluation and Corrective Action of PSM Program: a requirement that employers develop a system of periodic review and revision based on required inputs.
- Additional clarifications: clarify the following: that Process Safety Information must be continuously updated as changes are made, that all deficiencies found in Mechanical Integrity must be addressed, Management of Change, 1910.119(l), should include organizational changes, covered Appendix A chemical concentrations, and Retail Exemption.

The proposed rule remains in the pre-rule stage. It is expected that OSHA will convene the SBREFA panel soon.

Ninth Circuit Approves Employer's Rounding of Employee's Hours

By: Diana R. Schroeher, Esq.

The U.S. Court of Appeals for the Ninth Circuit ruled on May 2, 2016 that an employer's "rounding" policy used for calculating hourly employees' compensation is facially neutral, and did not violate federal wage and hour regulations. *Corbin v. Time-Warner Entertainment*, No. 13-55622, (9th Cir. May 2, 2016).

The U.S. Department of Labor's Wage and Hour Division has permitted the practice of "rounding" a non-exempt employee's hours worked to the nearest 5 minutes, or nearest quarter-hour. This Fair Labor Standards Act "rounding" regulation, 29 CFR § 785.48(b), has been in place for more than fifty years, and allows employers to round hours to "efficiently calculate hours worked without imposing any burden on employees". However, the practice cannot result in a failure to compensate employees for hours they actually worked.

Time-Warner's clock-in phone system electronically stamped each employee's "clock-in – clock-out" times, and rounded their total time to the nearest quarter hour each day. So, an employee who clocks in at 8:07 a.m. would see their wage statement reflect a clock-in of 8:00 a.m., rounding the time to the nearest quarter-hour and crediting the employee with the 7 minutes of time for which the employee was not actually on the clock. Conversely, an employee who clocks out at 5:05 p.m. would see their wage statement reflect a clock-out of 5:00 p.m., again rounding the time to the nearest quarter-hour, and deducting 5 minutes of work time for which the employee was actually on the clock. Time-Warner's employees are then paid in accordance with these rounded hours.

The Plaintiff, Andre Corbin, argued that Time-Warner's policy violated 29 CFR § 785.48(b), as it was not facially neutral, or neutral as applied to him. Corbin alleged he lost $15.02 in compensation over 13 months as a result of the rounding policy. The Court of Appeals found that Time-Warner's rounding policy was facially neutral in application, as employees were just as likely to gain minutes as lose minutes in any given pay period, and that their system was mechanical and not subject to manipulation by Time-Warner managers. The regulation is properly applied to all employees, and not just to an individual employee, and will be examined for neutrality "over a period of time" and not just over one or even several pay periods.

For more information, or to receive the full text of this Opinion, please contact the Law Firm.

ADELE ABRAMS SPEAKING SCHEDULE

May 17: BLR Webinar on MSHA 101
May 19: BLR Webinar on OSHA's Crystalline Silica Rule
May 24: National Electrical Contractors Assn. Safety Conference, Indianapolis, speak on OSHA/MSHA Update
June 1: IMA-NA Webinar on OSHA e-Recordkeeping Final Rule
June 2: BLR Webinar on OSHA Hazard Communication Standard Update
June 3: BLR Webinar on OSHA e-Recordkeeping Final Rule
June 7: SafePro zinc, Mine Safety Law Institute, Savannah, GA
June 8: NWPCA Government Affairs Conference, OSHA Update, Alexandria, VA
June 8: ASSE Delmarva Chapter Luncheon, speak on OSHA Update
June 8: WMACSA Dinner, speak on OSHA Update
June 16: BLR Webinar on OSHA New Enforcement Priorities
June 23: ClearLaw Webinar on Effective Discipline of Unsafe Workers
June 27: ASSE PDC, Atlanta GA, speak on Multi-Site Establishment Safety Management
June 28: ASSE PDC, Atlanta, GA, speak on Legal Privilege Issues for Safety & Health Documents
June 29: Progressive Business Conferences Webinar on Medical Marijuana Issues in Employment
July 11: Lorman Webinar on Effective Discipline of Unsafe Workers
July 26: BLR Webinar on Effective Management of OSHA Inspections
July 27: Business 21 Webinar on OSHA Recordkeeping
July 28: BLR Webinar on Hazard Recognition and Control
.August 8: Chesapeake Region Safety Council, Baltimore, MD, seminar on OSHA's Crystalline Silica Rule
August 30: AHMP Conference, Washington, DC, speak on OSHA General Duty Clause
August 31: National Business Institute, Baltimore MD, speak at one day employment law seminar
September 22: ASSE Region VI PDC, Myrtle Beach, SC, speak on Legal Liability for Safety & Health Professionals
October 5, Chesapeake Region Safety Council Annual Conference, Baltimore, MD
October 17: National Safety Council Annual Congress, Anaheim, CA, speak on Legally Effective Incident Investigation
November 1: MSHA Southeast Mine Safety Conference, Birmingham, AL, speak on crystalline silica
November 29: Northern Region Assn. of Safety Professionals, Fargo, ND, speak on OSHA Update, and Legal Liability Issues for ESH Professionals
December 13: Oregon independent Aggregates Assn./SafePro Inc., Albany, OR, speak on Mine Safety Legal Issues