



LAW OFFICE OF ADELE L. ABRAMS P.C.

ISSUE 7
NOVEMBER 4, 2014
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Ebola: OSHA Gets Into the Act By Adele L. Abrams, Esq., CMSP

For the past month or so, the lead story in every radio newscast and on line report has involved the potential threat from the Ebola virus in the United States. At this writing, multiple states have both foreign visitors and residents who either traveled or worked in West Africa, or who had “close personal contact” with such persons, in quarantine at hospitals or in “self-isolation” in their homes. Two American health care workers contracted Ebola while treating a visitor who later died; both of them were able to recover. The federal government has been urged to take greater steps to prevent the spread from foreign travelers and health care workers, and New Jersey and New York first announced more stringent quarantine plans, then rescinded them.

While the risk to most Americans living and working in the U.S. is likely to be low, Ebola will not be leaving the headlines anytime soon. Meanwhile, the Occupational Safety & Health Administration (OSHA) has gotten into the act and provided information to employers on management of Ebola threats in the workplace. Failure to follow OSHA’s recommended protective actions could lead to sanctions (citations and civil penalties) under the agency’s “General Duty Clause,” Section 5(a)(1) of the OSH Act, which requires employers to keep workplaces free from “recognized hazards” that could cause death or serious bodily harm, as well as other standards discussed below.

Ebola is a hemorrhagic fever caused by a virus, and transmitted by contact with blood, sweat, semen, vomit, diarrhea and other bodily fluids, and the virus can live

on surfaces for a period of time. It is fatal in 50-90 percent of cases, although some novel treatments used on the infected American nurses proved effective.

While most workplaces outside of the health care setting are not at especially high risk for individuals with Ebola, employers should still be aware of safe work practices. It is not uncommon for first aid to be provided to injured workers at worksites and if such a worker were to carry Ebola, it could readily be transmitted if proper precautions are not followed. Although few workers would be expected to have traveled recently to West Africa, they could have close personal contact with those in the health care community or emergency responders who transport or treat such individuals, or could have traveled in proximity to those infected on planes, trains, buses or subways, or used improperly cleaned utensils in restaurants.

OSHA now has a webpage on the Ebola issue, and points to the need for hazard recognition. While Ebola is not generally spread through casual contact, symptoms can appear abruptly, within 2-21 days after exposure to the virus. Therefore, supervisors should be familiar with the symptoms and be prepared to take action by isolating workers and notifying authorities if someone has a high fever or other symptoms consistent with Ebola. OSHA’s Bloodborne Pathogens (BBP) standard (29 CFR 1910.1030) covers exposure to Ebola as well as other communicable diseases.

Anyone in the workplace who is designated to provide first aid or medical treatment should be trained on the BBP “universal precautions” and the proper BBP protective equipment should be

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Ebola, con't.

available at the worksite. Employers can also be cited under OSHA's Respiratory Protection standard (1910.134) and the Personal Protective Equipment standard (1910.132) if they fail to have proper PPE on site and neglect to do a written PPE hazard assessment. Of course, any chemicals (e.g., bleach) that are used in cleaning up potentially infected waste are subject to the requirements of OSHA's Hazard Communication Standard (1910.1200), and workers handling them must be trained on the hazards and mandatory PPE, as indicated on the label or safety data sheet.

OSHA's guidance also focuses on control and prevention. This means that employers must follow generally accepted good infection control practices, ensure that workers dealing with infectious fluids wear gloves and wash with soap and water once they've removed gloves, and dispose of contaminated gloves in proper containers. Among other guidance that OSHA has issued is a guide to cleaning and decontaminating Ebola on surfaces in non-healthcare settings. See https://www.osha.gov/Publications/OSHA_FS-3756.pdf

Finally, OSHA expects that employers will train workers about the sources of Ebola exposure and appropriate precautions. Such training should be documented, and should cover the use of PPE, when and how it must be used, how to dispose of the equipment, and also any engineering controls or work practices that supplement the use of PPE. OSHA also stresses the worker rights aspect, and employers must educate workers about the hazards to which they are exposed.

Also remember that, under Section 11(c) of the OSH Act, employers cannot take adverse action against employees who become ill with Ebola, particularly if it was contracted on the job (in which case, it becomes an OSHA "recordable" event for injury/illness log purposes). In fact, Richard Trumka, head of the AFL-CIO, recently sent a letter to President Obama and Senate leaders urging, among other actions, that the government prohibit retaliation or discipline against workers who contract Ebola or who are placed under quarantine or restriction, and maintenance of wages and benefits for such workers.

See OSHA's comprehensive Ebola topics page at: <https://www.osha.gov/SLTC/ebola/index.html>. If additional guidance on safety or HR practices related to the Ebola outbreak are needed, please contact the Law Office.

MSHA Emphasizes Accident Investigation Procedures

By Joshua Schultz, Esq., MSP

On September 25, 2014, MSHA re-issued a Procedure Instruction Letter ("PIL") to supplement and revise MSHA's Accident/Illness Investigation Procedures Handbook. This policy letter notes two changes to the Agency's fatal accident investigation policy. Both changes are designed to create more opportunities for inspectors to speak with additional witnesses and persons who may provide secondary information not immediately available at accident scenes.

MSHA's reissuance of this PIL shows the agency is emphasizing training of inspectors on accident investigations and encouraging inspectors to aggressively pursue interviews with witnesses who may not have been on site at the time of the accident and may provide hearsay evidence. Hearsay evidence is admissible in the courts of the Federal Mine Safety and Health Review Commission.

The first change to the Accident/Illness Investigation Procedures Handbook instituted by this PIL requires accident investigators to "arrange an opportunity for family members of the victim to provide information relevant to the cause or contributing factors of the event directly to the investigation team." Investigators may obtain statements from family members regarding the victim's mental state or potential hearsay evidence of statements the victim gave to family members about safety issues at the workplace.

Secondly, the PIL requires the accident investigation team to create a public notice which will encourage any person with information regarding the accident to contact MSHA. MSHA will likely utilize the informant's privilege on statements obtained in this manner, which will prevent operators from learning the contents of these statements until 48 hours before the hearing for any MSHA citations issued as a result of the investigation.

Operators are required by MSHA to report "accidents" within 15 minutes in accordance with 30 CFR § 50.10. MSHA defines accidents as the death of an individual at the mine; an injury of an individual at the mine which has a reasonable potential to cause death; an entrapment of an individual at the mine which has a reasonable potential to cause death; or any other "accident" as defined by 30 CFR § 50.2. If MSHA has been alerted of an accident, they will issue

Investigation Procedures, con't.

103(j) and 103(k) orders which prevent access to the accident scene.

In addition to issuing orders to preserve the scene, MSHA will regularly request documents from an operator at the beginning of the accident investigation. MSHA may request mandatory as well as non-mandatory documents at this point. Mandatory documents are items which the Mine Act and MSHA regulations require operators to create and maintain, including Part 46/48 training plans and records, 7000-1 injury/illness forms (Part 50), quarterly hour reports, workplace examination reports (56/57.18002), pre-shift equipment inspection reports (56/57.14100(d)), electrical continuity & resistance testing (56/57.12028), hearing conservation programs and documents (Part 62), and hazCom materials (Part 47).

During an accident investigation, MSHA may seek additional documents not specifically required by the Mine Act or MSHA regulations pursuant to Sec. 103(a) or 108(a)(1)(E) of Mine Act. These documents may include non-privileged incident reports, self-inspection forms (audits), sampling results, purchase orders, safety committee minutes, worker's compensation and other insurance reports, and equipment inspection and calibration records.

Additionally, MSHA will conduct interviews with miners and any other witnesses to the accident immediately upon beginning an accident investigation. During an accident investigation, interviews with MSHA are voluntary; hourly employees and management have the right to give a private, confidential statement to MSHA or decline to speak with MSHA at all. However, MSHA may issue a citation under Section 103(a) of the Mine Act to a mine if operators refuse to provide basic information which is required for MSHA to conduct an accident investigation in an expeditious manner. The Review Commission has interpreted Section 103(a) of the Mine Act to require operators to turn over the home addresses and telephone number of miners to MSHA investigators during an MSHA accident investigation. See BHP Copper Inc., 21 FMSHRC 758 (July 30, 1999).

It is important to retain counsel as soon as possible during an accident investigation. After involving counsel, attorneys will direct operators to take statements and notes which may be privileged. This will protect operators from providing MSHA with admissions which could hinder their ability to successfully contest citations. Additionally, with

MSHA's emphasis on aggressive accident investigations, we strongly recommended engaging counsel on site immediately to ensure they are able to obtain an accurate record of events and statements, review documents, and prevent misleading or inaccurate statements.

OSHA Requests Information On New Occupational Exposure Limits By Brian Yellin, Esq., CIH

On Friday, October 10, 2014, the Occupational Safety and Health Administration (OSHA) issued its Request for Information (RFI) regarding "Chemical Management and Permissible Exposure Limits (PELs)." The RFI was published in the Federal Register in accordance with Executive Order 135610, Improving Chemical Facility Safety and Security. Comments may be submitted in hard copy, or electronically by fax or through the electronic portal at www.regulations.gov by April 8, 2015. The RFI's link is: <http://www.gpo.gov/fdsys/pkg/FR-2014-10-10/pdf/2014-24009.pdf>.

OSHA states that the purpose of the RFI is to obtain "stakeholder input about more effective and efficient approaches that addresses challenges found within the current regulatory approach" involving the establishment of new PELs or updating existing ones.

The RFI presents significant background information regarding the OSH Act's statutory framework for establishing PEL's, and the agency's historical approach to setting new PEL's, including applicable caselaw. In this respect, the RFI highlights OSHA's burden of proof regarding the establishment of a new standard, including the requirement that OSHA must demonstrate that exposure to a toxic substance poses a "significant risk of material impairment" and that the new standard "eliminates or reduces that risk to the extent feasible (economic and technical feasibility)."

The RFI also intends to "describe and explore other possible approaches" to reducing and controlling workplace chemical exposures. To that end, OSHA is seeking input into its risk assessment process, which relies on exposure-response modeling. More specifically, OSHA wants stakeholder input as to when model-based analysis is necessary or appropriate to determine the significance of the risk posed by a chemical agent, and whether a simpler and less onerous approach be employed.

OSHA also announced that it is considering a tiered process to its exposure-response assessment that it

Exposure Limits, con't.

believes will enable it to more “efficiently make the significant risk findings needed to establish acceptable PEL’s for large numbers of workplace chemicals.

The tiered process described by OSHA involves three stages: 1) dose-response analysis in the “observed range,” which includes analyzing exposures and adverse outcomes derived from human or animal studies; 2) margin of exposure determination where “low-end toxicity exposures” (LETE) are compared with the range of potential exposure limits that OSHA believes are feasible; and 3) exposure-response extrapolation which would be utilized for a high margin of exposure, where the dose-response relationship is extrapolated outside the observed range of exposures.

OSHA’s RFI also indicated the agency’s intention to explore the use of one or more chemical grouping approaches to expedite the risk assessment process such as grouping chemicals by common functional group, e.g. aldehydes, esters, specific metal ions, by common constituents or chemical classes and the likelihood of common precursors and/or breakdown products through biological processes.

OSHA is also seeking input regarding ways to streamline the method(s) by which it established the technological feasibility of a new chemical exposure limit. OSHA is considering several novel approaches to establish technical feasibility, including the use of computational fluid dynamics (CFD) as a method of modeling worker exposures and the potential effectiveness of different control strategies. In this respect, OSHA is interested in stakeholder input regarding the extent to which it should rely on modeling to establish exposure profiles and feasible control strategies, and the validation criteria that should be employed.

The RFI also discusses OSHA’s current approach to establish the economic feasibility of a chemical exposure limit and is seeking alternative approaches to formulating chemical exposure standards that are more simplified and streamlined. Some approaches highlighted in OSHA’s RFI include establishing a single health standard for a single process, e.g. abrasive blasting, welding, electroplating, rather than a single chemical that is found in many processes. OSHA also highlighted its consideration of control banding, which addresses hazard control(s) for specific processes rather than specific chemical agents.

Finally, OSHA is considering potential alternative approaches to regulating worker exposure the

hazardous chemicals, including non-occupational exposure limit (non-OEL) strategies, including “informed substitution” from hazardous chemicals to safer substances, health hazard banding, which involves the grouping of chemicals into categories of similar toxicity and hazard characteristics, control banding, which is particularly useful to small employers since it reduces and/or eliminates the need for exposure monitoring, and task-based exposure assessment and control approaches by using a mandated job hazard analysis.

For assistance in crafting your comments and input, please contact the Law Office.

MSHA Gives Operator’s Alternative Process For Challenging A Safeguard By Sarah Korwan, Esq.

Historically, the Mine Act has not provided operators a direct provision to challenge a notice of safeguard. Inspectors issue a safeguard notice to an operator when the inspector believes that a transportation hazard exists at the mine. Recently MSHA issued guidance on the procedure for operator’s challenging a safeguard notice.

[Program Policy Letter \(PPL\) P14-V-02](#), effective September 24, 2014, allows operators to request a formal citation in lieu of a safeguard notice. This permits the operator to follow the litigation route they are afforded for any citation.

Before The District Office will issue the requested citation, the operator engages in an informal conference with the District Manager. If the District Manager and the operator are unable to resolve the issue, the PPL suggests that the District Manager should issue the citation; it is not mandatory.

The “good news” for the operator is that it can contest the citation, if the District Manager agrees to issue one. The validity of the underlying safeguard notice becomes part of the challenge. As with any issuance, the operator must abate the citation/safeguard to MSHA’s satisfaction.

However, operators must assess whether to exercise this request because there could be negative consequences. The PPL states that the citation will “normally” be issued as a 104(a) citation and not an unwarrantable failure finding, “unless the circumstances justify it.” Unfortunately, requesting a citation opens the door to a potential 104(d) citation. Therefore, the circumstances and facts surrounding the issuance must be analyzed before making the request to avoid unintended consequences.

Court of Appeals Issues Decision on OSHA Hazard Communication Standard

By Gary Visscher, Esq.

When OSHA revised the Hazard Communication Standard in 2012, the primary reason was to harmonize U.S. chemical hazard warning rules with the “Globally Harmonized System,” or GHS. However, in a few important aspects, OSHA’s revised Hazard Communication Standard does not align with the GHS. One such aspect is the identification and treatment of “combustible dust,” which the Hazard Communication Standard, unlike GHS, lists as a separate hazard classification.

A number of agricultural product associations filed a lawsuit challenging OSHA’s final rule and the inclusion and treatment of combustible dust, both on the grounds that OSHA had not given adequate notice in the proposed rule that OSHA intended to include combustible in the standard, and the fact that the standard does not include a definition of combustible dust.

The U.S. Court of Appeals, D.C. Circuit, decision, issued on October 24, 2014, upheld the Hazard Communication Standard and the inclusion of provisions on combustible dust. The Court held that OSHA provided notice in the proposed rule of its intent to include combustible dust, and that the hazard was sufficiently well defined for regulated parties to be able to comply.

The Court of Appeals cited OSHA’s reference in the preamble to the definition of combustible dust included in OSHA’s 2009 Combustible Dust National Emphasis Program directive. The Court also cited a 2013 OSHA guidance document, which outlined how the agency intended to enforce the combustible dust provisions of the Hazard Communication Standard. In the guidance document, OSHA said that combustible dust hazards should be included on Safety Data Sheets and labels if the product has been previously involved in a dust fire or explosion, there is laboratory test data or published test results indicating a dust is combustible, or on the basis of particle size, using either of two size standards.

Employers whose operations produce fine particles or dust which may be combustible should insure that the safety data sheets and labels, signs or placards include combustible dust hazards and that employees are trained on the hazard. The 2012 Hazard Communication Standard includes phased-in effective dates – employees were required to be trained on the

revised standard as of December 1, 2013.

Manufacturers, importers and employers have until June 1, 2015 to provide Safety Data Sheets and labels that comply with the revised standard, except that containers may be shipped with the old labels until December 1, 2015.

ALJ Rules That Secretary Must Establish that a Pattern of Violation Exists

By Tina Stanczewski, Esq., MSP

Although the Federal Mine Safety and Health Review Commission ruled the Pattern of Violation rule is valid, Administrative Law Judge Moran has placed the first guidelines on the Secretary for establishing that an Operator actually has violated the rule. (Docket Nos. WEVA 2014-82-R et al). ALJ Moran dismissed the POV charge as a violation of due process and compared the Secretary’s approach to charging Brody with violating the POV rule with that of a board/card game where “the rules were announced only after the game had been played, after the hand had been played, and that one party announced the basis for the winning hand.”

With 103 orders, 54 of which the Secretary alleged to be part of a “Pattern of Violation, Brody Mining LLC had already challenged the POV rule on its face, but was required to challenge the issue of whether these orders constituted a pattern and also whether each order was a valid violation constituting a penalty under the Mine Act.

ALJ Moran found the Secretary’s failure to notify the operator of what constitutes a pattern and failure to assert as part of its litigation position to the Court the basis for this allegation, a clear violation of due process. In essence, the Secretary wanted to alert the Court to what citations supported its POV claim after the ALJ ruled on which citations rose to Significant and Substantial (S&S) or testimony had been heard to which the Secretary felt supported its case for a POV charge. Therefore, the Secretary did not choose to make an independent assessment of which citations supported its case of POV violation, notify the operator of this assessment or notify the Court.

The POV rule never defined as law what makes a pattern of violation. Therefore, it is either up to the Court to establish through case law or the law requires revising to provide legal guidance. According to ALJ Moran, to establish a POV, the Secretary required a theory as to why there was a pattern, prove the citations were violations, and

POV, con't.

prove these violations were S&S. Brody submitted a Motion in Limine prior to trial requesting guidelines in order to develop its defense because the Secretary had failed to assert its theory. The Secretary failed to provide the information on what is a pattern, how many citations found to be S&S would support a pattern (or how many Brody had to defend were not S&S), and how the citations found to be S&S made a pattern as defined by the rule.

For efficiency, the ALJ heard all of the evidence on each citation over a three week period. This provided timely adjudication and a basis for the Appellate courts to review the testimony and evidence. After the first week, the Secretary asserted that a POV existed because 15 citations were issued as S&S (testimony was heard on 12, one was found to be S&S by the ALJ, and three were agreed by the parties to be S&S). The Secretary offered no "reason" for why these 15 citations constituted a pattern. As a result, ALJ Moran dismissed the POV charge.

This ruling provides hope that MSHA will reassess the POV rule and establish clear guidelines to which operators can respond. As ALJ Moran pointed out, the Secretary has taken 35 years to really utilize the POV provision of the Mine Act. It is only fair to operators for the Secretary to explain the charge and how to address the charge.