LAW OFFICE OF
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ISSUE 10
OCTOBER 22, 2015

Don't Borrow Trouble … or Scaffolds!

By: Adele L. Abrams, Esq., CMSP

A Georgia stucco contractor learned the hard way that borrowing another subcontractor's defective scaffolds can result in some heavy OSHA penalties. In the July 2015 decision in Secretary of Labor v. Georgia Carolina Stucco, Inc., Administrative Law Judge Calhoun affirmed three repeat citation items related to the use of a different masonry contractor's scaffolds that lacked planking, appropriate guard rails and access ladders. Over $18,000 in civil penalties were affirmed.

The matter started when an OSHA inspector initiated a targeted jobsite inspection at an assisted living facility construction worksite, where Cameron General Construction was the general contractor, and Georgia Carolina Stucco (G-C) was among several subcontractors working on site, including masonry contractors Metro Masonry and Quality Masonry. Although G-C normally supplied their own scaffolds, on this job there was an agreement to use the masonry contractor's scaffolds that were already on site. When G-C's foreman, Francisco Lara, examined the scaffolds, he found they were not compliant and notified his company. He testified that the owner of G-C told him to use them anyway, and that the superintendent of Cameron told him the same thing.

There were two scaffolds involved and neither was fully planked. There were no guardrails on the third levels, where G-C employees were working, and no ladder was attached to either scaffold. There was no fall protection in use at the time of the inspection. The scaffold was nearly 21 feet in height. When the inspector arrived, he observed (and photographed) foreman Lara climbing up the outside of the scaffold. OSHA learned that other G-C employees had accessed the scaffolds by either climbing the scaffold frame or going through the windows of the building adjacent to the scaffolds. Quality Masonry also had employees on the faulty scaffolds and both companies were cited (although only G-C's citations were at issue in this decision).

Foreman Lara told the inspector that the scaffolds belonged to Metro and had been erected by Quality. He later tried to claim that they were in the process of dismantling the scaffold, but the inspector (and judge) did not buy that as the inspection occurred at 8:45 am and work on the building was still in progress.

G-C was cited under three standards: 29 CFR 1926.451(b)(1) (which requires each platform on all working levels of scaffolds to be fully planked); 1926.451(e)(1) (which provides that scaffold platforms more than 2 feet above a point of access must have ladders, stair towers, ramps, walkways, personnel hoists or other methods of access, and stipulates that cross braces cannot be used for access); and, 1926.451(g)(1) (which require each employee on a scaffold more than 10 feet above a lower level to be protected against falling to the lower level). Each citation item, classified as repeat and serious, was separately assessed at $6,160. While sometimes OSHA will "group" citation items that relate to a single piece of equipment, and impose a single penalty, the agency elected not to do so in this case.

To prove a serious violation, OSHA has the burden of proving by a preponderance of evidence that: (1) the cited standard applies, (2) there was noncompliance, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of the conditions. G-C stipulated to the

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applicability of the standard, the violations themselves, and access by its workers, but challenged the "knowledge" component at trial. It also defended by claiming that the cited scaffolds did not belong to the company. While OSHA agreed that Metro Masonry owned the scaffolds at issue, ownership of the noncompliant condition is not controlling in assessing whether the terms of the standard are in compliance.

At trial, OSHA argued that G-C had actual knowledge of the violative conditions through its foreman, Lara, a supervisory employee who worked on the scaffolds alongside two subordinate employees of the company. The agency argued that Lara's knowledge was imputed to G-C, but also noted that Lara testified about his call to the company owner, who instructed him to use the scaffolds until G-C could get proper equipment to the work crew. Lara testified that he was aware of the deficiencies and that he was aware that his subordinates were working from them, that he climbed the scaffold frame himself, and that his co-workers climbed onto the scaffolds through the windows.

G-C raised an affirmative defense of employee misconduct/isolated incident. This was rejected because, while the company claimed that it trained employees, had a safety program and disciplined employees who violated safety rules, in fact Mr. Lara had only received a verbal reprimand (rather than suspension or termination) and the judge found that the fact that three workers (including a supervisor) worked from an improper scaffold at the direction of the company owner showed that G-C "placed expediency over employee safety in this instance and suggests the company condoned safety violations."

G-C's defense that the general contractor had instructed their foreman to use the scaffold and that this provided the "Darden" doctrine defense (that the cited employer was not the employer of the affected workers). The judge disposed of this defense as well, noting that an analysis of the factors in this case showed that Cameron General Construction did not "control" Lara but simply had general oversight and control of the jobsite. It did not have the authority to direct G-C's employees in their daily work activities.

Finally, on the "knowledge" element, while G-C tried to invoke the "ComTran" defense – recognized by the U.S. Court of Appeals for the 11th Circuit in cases where the supervisor who violates the law is the only employee at risk and acted alone – the judge found that this was an ordinary case in which the long-standing precedent of holding an employer responsible by imputing the knowledge and actions of a supervisor to the company. Here, Lara was aware of the violative actions of his subordinate employees in also using the defective scaffold and, as the judge wrote: "The supervisor acts as the 'eyes and ears' of the absent employer. That makes his knowledge the employer's knowledge."

The bottom line: Don't borrow OSHA trouble by borrowing defective equipment!

OSHA Outlines New System for Assigning Inspections

By: Nicholas W. Scala, Esq., CMSP

OSHA Assistant Secretary, Dr. David Michaels, posted a brief explanation and notice to industry regarding OSHA's new system for assigning inspections. The post was uploaded to the Department of Labor's blog on October 1, 2015. In the post, Dr. Michaels explains, in general terms, how OSHA will evaluate safety and health inspections moving forward to determine the necessary resources for each inspection.

In FY 2014, there were over 80,000 safety and health inspections conducted around the country by OSHA and its state plan partners (over one half of the inspections were conducted by states). In an attempt to better allocate resources, OSHA has developed a new program which assigns point values to different types of inspections depending on the inspections complexity and type. The values will range from one (1) point to eight (8) points for the inspections that require the greatest time and resources. Each point is called an Enforcement Unit. Dr. Michaels included some predetermined examples of point values such as: a routine inspection is one (1) point; workplace violence inspection is three (3) points; and a process safety management inspection is seven (7) points.

The goal is to better allocate OSHA's resources, and in order to do this they are taking into consideration the time and number of inspectors that may be required to complete an investigation in the most efficient manner. Given that OSHA regulated sites are not subject to a number of inspections per year, unlike those under MSHA's jurisdiction, OSHA simply does not have the resources or inspectors to visit each work site around the country. This weighted system hopes to improve OSHA's ability to tackle both large and small inspections. The program has been piloted for the last two years, and the results weighed against the existing system for assigning inspections. OSHA claims that this will not change as the program is rolled out in full affect, and the agency will continue to look for ways to improve the inspection process so that both the most complex and routine investigations are addressed.

Department Of Justice Goes to the Top

By: Sarah Korwan, Esq.

Individuals at the top of the corporate food chain are no longer immune from prosecution as the Department of Justice (DOJ) is redoubling its effort to hold individuals responsible for alleged wrongdoing, rather than seeking monetary remunerations from corporate defendants. Rarely is a CEO held responsible for company activities far removed from the board room. However, jury selection began on October 1, 2015, in the criminal trial of former Massey Energy CEO Don Blankenship relating to the April 5, 2010 explosion at Upper Big Branch Mine in southern West Virginia that killed 29 miners. This prosecution is unprecedented as Mr. Blankenship is the highest ranking official ever to be indicted on federal criminal charges stemming from a coal mine accident. More typically, the government pursues and obtains a guilty plea and hefty fine from the corporation, and seldom goes after top company officials in this manner.

MSHA has long harbored the belief that Massey was a scofflaw operator. The DOJ is trying to validate this belief. Although Mr. Blankenship is not specifically charged with causing the mine disaster, the allegations against him focus on the event at the Upper Big Branch mine, located in Raleigh County, WV, and the operating conditions prior to the explosion. Specifically, the indictment alleges Blankenship lied to federal regulators about repeated safety violations at the UBB mine. He also allegedly lied to Securities and Exchange Commission officials and investors about Massey safety policies in an effort to stop stock prices from falling. Finally, he is also charged with conspiring to defraud MSHA regarding the UBB explosion.

In the Blankenship trial, prosecutors must draw a direct line from the UBB event and conditions at the mine to executive management. Prosecutors will use a paper trail of emails, and documents to try to establish Blankenship was a micromanager in daily operations of the Upper Big Branch mine. The prosecution will likely also call former managers with direct knowledge from within the company who can testify to Blankenship's well-known, hands-on management style to build the link between him and the explosion at the mine.

In a food safety action, a federal jury recently convicted Stewart Parnell, former CEO of Peanut Corporation of America, of knowingly shipping contaminated peanut butter and faking the results of lab tests for salmonella. The salmonella outbreak in 2008-2009, which sickened more than 700 people in 46 states and contributed to nine deaths, was traced to Parnell's southwest Georgia peanut plant.

Again, prosecutors used emails to connect Parnell's management of the company to the contaminated product which resulted in the salmonella outbreak. In one email exchange produced at the trial, when Parnell was told that a shipment was delayed because results of salmonella tests weren't yet available, he wrote back, "…just ship it."

Parnell was sentenced to 28 years in prison. This is the harshest punishment ever given to a producer in a food illness case. Parnell's brother, Michael Parnell, the plant manager and food broker, was sentenced to 20-years. The DOJ charged the Parnell brothers with felonies. Prior cases involved misdemeanors. The case stemmed from Food and Drug Administration and the Centers for Disease Control and Prevention findings that traced the national salmonella outbreak to the Parnell company's peanut roasting plant in Blakely, Ga.

The Department of Justice is also ramping up its efforts to seek retribution against white collar financial employees and Wall Street executives. Attorney General Loretta E. Lynch in a memo, dated September 9, 2015, to all United States' Attorneys and Assistant Attorneys' General nationwide in all divisions of the federal government announced a major new initiative designed to target and pursue "accountability from the individuals" who "perpetrate corporate wrongdoing." The new guidelines direct civil and criminal investigators to focus on individuals from the beginning of investigations and indicate that individual executives in white-collar cases will be held accountable, and not solely the corporations. According to Deputy Attorney General Sally Q. Yates, who authored the memo, the Justice Department wants to pursue not just corporate entities, but the individuals through which the corporations act. Although the memo simply proposes guidelines for federal prosecutors, it is not actual law and is still subject to interpretation by Justice Department officials.

Since the creation of the federal Occupational Safety and Health Administration (OSHA) 45 years ago, there have been more than 200,000 workplace fatalities, yet fewer than eighty have been prosecuted – less than two per year– and only a dozen or so have resulted in criminal convictions. The maximum penalty companies face for a "willful violation" of OSHA laws is a misdemeanor, and must refer a matter to the Department of Justice to investigate and prosecute felonies. However, the number of referrals is certain to rise, especially during the current White House administration, as will prosecutions, as Justice pursues its mission to hold accountable individuals allegedly responsible for corporate misconduct.

House Subcommittee Holds Oversight Hearing on OSHA

By: Gary Visscher, Esq.

The House Education and Workforce Committee's Subcommittee on Workforce Protections held an oversight hearing on October 7, 2015 in order to question OSHA Assistant Secretary David Michaels regarding recent actions taken by OSHA. Dr. Michaels, who has served as Assistant Secretary since 2009, is the longest serving Assistant Secretary in the history of OSHA.

Subcommittee Chairman Walberg (MI) indicated in his opening statement and with his questions to the Assistant Secretary that a chief concern of the Subcommittee is OSHA's recent issuance of "guidance documents" to effect changes in its interpretation of standards, rather than engage in rulemaking with opportunity for public participation and input. Last week four members of the U.S. Senate also sent a letter to the Secretary of Labor criticizing OSHA's use of such guidance documents to change interpretations of standards rather than go through notice and comment rulemaking.

One example highlighted by Chairman Walberg is OSHA's recent change in the exemption for "retail establishments" under the Process Safety Management (PSM) standard. Earlier this year OSHA issued a letter of interpretation that changed its long-standing interpretation of the exemption. At the time OSHA estimated that the change meant that approximately 4,800 establishments that were previously exempt from PSM would now be covered. Assistant Secretary Michaels responded that OSHA believed that its previous interpretation was actually a misinterpretation of the standard.

In his testimony to the Subcommittee, Assistant Secretary Michaels highlighted OSHA's work on new standards, including updating electrical standards, new injury and illness reporting requirements, and the proposed silica standard. He also highlighted increased resources and focus on OSHA's enforcement of 22 whistleblower laws, and OSHA's increased efforts to hold host employers responsible for health and safety of temporary workers.

Assistant Secretary Michaels also made a plea for legislative changes to the OSH Act, particularly in three areas: (1) increasing criminal and civil penalties, (2) coverage of public sector employees, and (3) changes to section 11 (c) whistleblower protections under the OSH Act. Regarding an increase in penalties, Dr. Michaels cited the recent case at DuPont's Texas facility in which, in the aftermath of a fatal chemical release, OSHA fined DuPont $175,000, while the EPA penalty for damage to the environment was $10 million. In responding to a question, Dr. Michaels said that the Administration would also support a change in the law to allow "repeat" violations to be based on violations occurring in state plan states.

With regard to other current issues, Assistant Secretary Michaels said that the final rule on electronic reporting on injuries and illnesses had "just been sent" to OMB for approval. He acknowledged that OSHA had begun asking government contractors for additional information in light of the President's Executive Order 13673 on "Fair Pay and Safe Workplaces," but did not explain how that information would be used. He also said that federal OSHA was still working on how to define or measure the "at least as effective" language in the OSH Act regarding state OSHA programs, despite the fact that federal OSHA has taken action against several state programs which were not deemed satisfactory.

OSHA's rule requiring reporting of any hospitalization or amputation took effect as of January 1, 2015. Late last year the Directorate on Enforcement issued guidance to OSHA area offices regarding how such reports should be followed-up by OSHA. According to the guidance, certain factors should trigger an inspection, in other cases the OSHA area office may call the employer or request that the employer submit documents and information to the area office. According to Dr. Michaels, thus far about 40% of reports have resulted in an inspection by OSHA.

Attendance at the hearing was light. The most direct criticism of OSHA came from two House members who attended the hearing though they are not members of the Subcommittee. Rep. Hartzler (MO) and Rep. Rogers (AL) both expressed deep concerns with OSHA's enforcement actions, especially against small businesses, and each brought up specific examples of what seemed to be overreaching enforcement. Assistant Secretary Michaels promised to look into any specific cases that were brought to his attention by the Members. He also repeatedly cited OSHA's small business consultation program and other compliance assistance programs in responding to Members' concerns for small businesses. Obviously there is some irony there. The Obama Administration came into office with proposals to change - many would say undermine - the small business

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consultation and VPP programs, and the Administration's budget proposals have consistently emphasized enforcement over compliance assistance programs, though Congress has not gone along with those spending priorities.

Ranking Member Wilson (FL) urged the Committee to take up some or all of the provisions of H.R. 2090, the Protecting American Workers Act (PAWA). In his closing remarks, Chairman Walberg expressed the hope that business, labor, and government could work in partnership on protecting workers' health and safety, but he did not indicate that the Committee currently plans to consider any legislation on OSHA.

ALJ Rules Denies Miner's Section 105(c) Discrimination Claim, Citing No Adverse Action

By: Joshua Schultz, Esq., MSP

In a September 28, 2015 ruling, Administrative Law Judge Moran granted Alcoa World Alumina, Inc.'s Motion for Summary Decision, finding that a miner's allegations of discrimination were not supported by an adverse action from the company. Notably, Judge Moran ruled that an allegation of a threat which was "vague" and not followed by any detrimental activity towards the complainant did not constitute an adverse action.

To succeed on a claim under section 105(c)(1) of the Mine Act, a complainant must first show that he/she engaged in protected activity. Examples of protected activities include, but are not limited to: raising safety and health complaints with management; complaints to MSHA or other regulatory agencies; giving a statement to government inspectors during inspections or investigations; and exercising any statutory rights under the Mine Act.

The second element a complainant must prove is that after he/she engaged in a protected activity, he/she suffered adverse employment action that was motivated in any part by that protected activity. Under MSHA case law, the scope of an adverse action is not limited to terminations, demotions, and formal discipline, but rather extends to "more subtle forms of discrimination." In this case, the complainant's alleged protected activity was alerting the company safety and health manager to a perceived safety violation in his role as miners' representative. The complainant alleged that he suffered adverse actions in that he was denied overtime or had his overtime questioned, he was assigned tasks to remove him from the scene of the perceived safety violation, and that he was verbally threatened by his supervisor. Judge Moran ruled that these claims of an adverse action did not have merit.

Judge Moran determined that the complainant's supervisor's alleged threat was vague and not clearly directed at the protected activity, and was thus not an adverse action. The complainant alleged that his supervisor threatened to remove him from the scene because he attempted to take charge of the situation. Judge Moran ruled that even if this threat "remained live in that moment, subsequent events quickly showed that [complainant] was in no danger of retribution." Reasoning that the complainant was not removed in any way that day, is still employed at Alcoa in the same position, remains a miners' representative, and was never disciplined for the incident, the Judge found that this threat did not rise to the level of adverse action.

Regarding the other allegations of adverse action, the ALJ determined that the complainant did not provide "any evidence that he was sent away because he was a representative." He noted that the other miners' representative at the scene was not sent away from the area.

Finally, the ALJ noted that the allegation that mine management questioned or denied the complainant's overtime request occurred before the protected activity. Thus, Judge Moran ruled that this allegation was not traceable to the complainant's protected activity and was not an adverse action under the circumstances.

Waters OF U.S. Rule Stayed

By: Tina M. Stanczewski, Esq., MSP

Although divided, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit decided to stay the enforcement of the controversial Waters of U.S. rule which many argue expands federal jurisdiction over waters illegally. The stay is nationwide. Although the Court's jurisdiction over the matter remains up for debate, the Court stated

> *[W]e conclude that petitioners have demonstrated a substantial possibility of success on the merits of their claims. . . . What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters.*

This is not the first stay. Thirteen state courts already issued stays. For now, this decision provides some relief for an industry already pressured by overregulation.

Department of Labor Reports on 2014 Fatal Injuries in the Workplace

By: Gary Visscher, Esq.

Last month the Department of Labor's Bureau of Labor Statistics (BLS) issued its annual report on the number of workplace fatalities – the "census of fatal occupational injuries," or CFOI, for 2014. BLS began the annual census in 1992, in order to provide more accurate and complete data and information on workplace fatalities occurring in the U.S. The report issued in September each year is a preliminary count; BLS will issue the final count for 2014 sometime in spring 2016.

Along with reporting the total number of workplace fatalities, the BLS report details the number of workplace fatalities by industry and by activity, as well as by various demographic factors. The report is available on the BLS website, bls.gov.

BLS reported that total fatal work injuries increased in 2014, from 4,579 in 2013 to a preliminary count of 4,679 in 2014. BLS also notes that, based on previous years' experience, the number of workplace fatalities occurring in 2014 will probably increase when BLS releases revised data next spring.

The 4,679 workplace fatalities in 2014 was the highest number since 2011. The number of workplace fatalities has generally trended downward since 1992, though year to year increases have not been uncommon. The trend line has not been steep: in 1992 BLS reported that there were 6,217 workplace fatalities.

Because the number of hours worked by U.S. workers increased in 2014, the rate of fatal injuries in 2014 was the same as the rate in 2013 (3.3 per 100,000 workers).

As in past years, transportation accidents were the leading cause of fatal work injuries, accounting for 40% of fatalities in 2014. This number includes both roadway accidents and other transportation related incidents; roadway accidents accounted for 23% of workplace fatalities.

After transportation accidents, falls and workplace violence are the second and third largest causes of workplace fatalities. Deaths from falls, slips and trips accounted for 17% of workplace fatalities in 2014. The number of fatalities caused by falls, slips and trips increased by 10%, from 724 to 793 in 2014.

BLS reported that fatal work injuries increased in mining (17% increase), agriculture (14% increase), manufacturing (9% increase) and construction (6% increase). The increase in mining deaths was due to an increase in fatalities in oil and gas extraction, which is grouped with mining in the BLS report. The number of deaths in oil and gas extraction increased from 112 in 2013 to 142 in 2014 according to BLS.

A recent report by NIOSH found that while the number of work-related fatalities in oil and gas had increased by about 27% between 2003 and 2013, the fatality rate had actually decreased by 36% during the same time period, reflecting the increased employment in oil and gas during that time. The NIOSH report also found that 40% of the fatalities in oil and gas during that time were attributed to transportation accidents, with an additional 26% attributed to "contact with objects/equipment."

The largest number of fatalities was in construction, which accounted for 19% of fatalities occurring in 2014. The construction industry's rate of fatal injury was lower than three other industry groupings – agriculture, forestry, fishing; mining, quarrying, oil and gas extraction; and transportation and warehousing.

BLS reported that older workers were more likely to be fatally injured than younger workers. While the overall rate of fatal injury was 3.3 per 100,000 workers, each of the age groups 45 and older (45-54, 55-64, and 65 and older) exceeded the overall rate and those younger than 45 were under the overall rate. Workers 55-64 had an overall fatality rate of 4.1 per 100,000 and those 65 and over had a rate of 10.2 per 100,000. BLS reported that the number of workers 55 and older who were fatally injured in 2014 was the highest annual number since the CFOI began in 1992.

Fatalities also increased among self-employed workers and contracted workers. Fatalities among Hispanic and Latino workers remain high, though the number of fatalities has decreased from more than 900 per year from 2004 – 2007 to 789 in 2014. BLS reported that workplace fatalities increased over 2013 in 24 states, decreased in 22 states and the District of Columbia, and four states had no change.

The BLS CFOI report provides much useful information for employers and others on the types of events and other factors that statistically have been most likely to result in a fatal accident. The report is also a sobering reminder of the too-prevalent occurrence of fatal workplace accidents.

Updated Underground Storage Tank Regulations

By: Ryan Horka, J.D.

The EPA recently strengthened the federal underground storage tank (UST) regulations, originally promulgated in 1988. The new regulations were published in the Federal Register on July 15, 2015, and went into effect on October 13, 2015. According to EPA, these changes "will better protect people's health and benefit the environment in communities across the country by improving prevention and detection of underground

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storage tank releases," as well as "help ensure consistency in implementing the tanks program among states and on tribal land." In addition to the new UST regulations, the EPA also made revisions to the 1988 state program approval (SPA) regulation. The revised regulations include, but are not limited to:

- Adding secondary containment requirements for new and replaced tanks and piping;
- Adding operator training requirements;
- Adding periodic operation and maintenance requirements for UST systems;
- Removing past deferrals for emergency generator tanks, airport hydrant systems, and field-constructed tanks;
- Adding new release prevention and detection technologies;
- Updating codes of practice; and
- Updating state program approval requirements to incorporate these new changes.

For the most part, the UST program is implemented by states and territories. Currently, 38 states, the District of Columbia, and Puerto Rico have SPA and now have three years to reapply in order to maintain that status. However, until these states or territories change their requirements or until their SPA status changes, owners and operators within those states or territories should continue to follow the current state requirements. According to the new regulations, the new federal revisions will be implemented in three waves. As of October 13, 2015:

- Regarding new installations and replacements, flow restrictors in vent lines may no longer be used to meet the overfill prevention requirements;
- Must submit notification of ownership changes and compatibility demonstrations;
- Must close internally lined tanks that fail the internal lining inspection and cannot be repaired according to a code of practice; and
- Must conduct testing after a repair. As of April 10, 2016 (180 days after effective date):
- All new and replaced tank systems must have secondary containment and interstitial monitoring.

As of October 12, 2018 (3 years after effective date):

- Must provide required training for UST owners and operators;

  Must begin monthly walkthrough inspections and annual testing for spill and overfill prevention equipment;

Must submit one-time notification for previously deferred tank systems; and

- Must begin release detection monitoring for previously deferred tank systems associated with emergency generators, field-constructed tanks, airport hydrant systems, and wastewater treatment tank systems.

For additional guidance on these new regulations, contact the Law Office.

Equipment Must be Functional "At All Times"

By: Diana Schroeher, Esq.

The Mine Safety and Health Review Commission has further clarified the operator's duty in a case involving horns or audible warning devices, finding that 30 CFR § 56.14132(a) " imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair" and that means that the warning devices must be functional at all times, not just intermittently. The standard requires that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

In *Secretary of Labor v. Beverly Materials*, LLC, Docket No. LAKE 2011-957-M, September 1, 2015, the Commission reversed the Judge, who had vacated a citation for a horn on a scraper that worked intermittently. The Judge found the standard was not violated, because during the morning pre-shift examination the horn had actually worked, and because the inspector actually heard the horn working during the inspection day. The citation was vacated despite the fact that the horn did NOT work on both times the inspector tested the equipment. The Judge noted that the inspector conceded that the horn could have been working during the morning pre-shift examination.

The Commission referred back to their Wake Stone decision (April 2014) (see our June 9, 2014 newsletter) wherein the duty to ensure that equipment, specifically warning devices under 56.14132(a), "must function at all times unless the equipment has been taken out of service for repair." The Commission noted that the definitions of the terms "maintain" and "functional" were previously reviewed in both Wake Stone and the earlier Commission decision Nally & Hamilton (August 2011). In these earlier decisions, the Commission found the words "maintain" and "functional" plainly required the warning devices be capable of "uninterrupted performance at all times."

The Commission's decision in Beverly Materials is concise, but firmly clarifies the operator's duty to ensure warning devices are functional at all times, and not just at start-up, so long as that equipment is not tagged out of service for repair.

FMSHRC Decision Strengthens MSHA'S "Pattern of Violations" Authority

By: Ryan Horka, J.D.

According to § 104(e) of the Mine Act, MSHA may provide written notice of a "pattern of violations" (POV) to any operator who demonstrates a lack of concern for the safety of his/her miners through a pattern of significant and substantial (S&S) violations. Once such written notice has been provided to an operator, MSHA may issue 104(e) withdrawal orders for any other S&S violations that the operator receives within the next 90 days. The 2013 revisions to the regulations eliminated two significant requirements: (1) that MSHA only consider final orders in its POV review and (2) that MSHA issue a potential POV notice prior to issuing a POV notice.

In the Brody Mining matter, Brody Mining was issued a POV notice after receiving 253 S&S violations within a 12 month period. Moreover, it was determined that miners' injuries resulted in 1,757 lost workdays, 367 of which arose from 8 injuries that Brody Mining failed to report to MSHA. In an initial interlocutory appeal, the Federal Mine Safety and Health Review Commission upheld the facial validity of the revised POV statute.

Subsequently, the ALJ adjudicating the matter dismissed the POV notice, reasoning that the Secretary failed to adequately set forth the basis for the POV charge and denied Brody Mining procedural due process. In arriving at this decision, the ALJ considered Brody Mining's contentions that the Secretary had not identified "(1) what constituted a pattern of violations; (2) what number of S&S designations Brody had to prevail upon to defeat the pattern of violations designation; and (3) how the grouping of citations in the pattern notice constituted a pattern of violations." As a result of his decision to dismiss the POV notice, he converted all 104(e) withdrawal orders to 104(a) citations.

On August 28, 2014, the Review Commission was faced with a second interlocutory appeal, at which time they reviewed the application of the POV statute to Brody Mining. They encountered two issues on this appeal: (1) whether the ALJ had jurisdiction to decide the validity of the POV notice and, if so, (2) whether he erred in dismissing the notice. On September 29, 2015, the Review Commission issued their decision in Secretary of Labor v. Brody Mining, LLC, 2015 WL 5783236, overturning the earlier decision of the ALJ. After finding that the ALJ did, in fact, have jurisdiction to rule on the validity of the POV notice, the Review Commission went on to overrule the ALJ's decision to dismiss the notice.

First, the Commission addressed the ALJ's determination that the Secretary failed to adequately define "pattern of violations." After reviewing the legislative history, the language of the statute, and the Black's Law Dictionary definition of "pattern," the Commission ruled that a POV "is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." In addition, they opined that there is no specific number of S&S violations required for a POV and there is no need to find an element of intent or state of mind. Moreover, the Commission pointed to eight criteria, set forth by MSHA in the POV regulations, which can be utilized to determine the existence of a POV:

1.) Citations for S&S violations;
2.) Orders under § 104(b) of the Mine Act for not abating S&S violations;
3.) Citations and withdrawal orders under § 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
4.) Imminent danger orders under § 107(a) of the Mine Act;
5.) Orders under § 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
6.) Enforcement measures, other than § 104(e) of the Mine Act, that have been applied at the mine;
7.) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
8.) Mitigating circumstances.

Second, the Commission, addressing the ALJ's reasoning that it was necessary for Brody Mining to know the number of S&S violations they needed to succeed on in order to defeat the POV, found that there is no requirement that the Secretary set forth a minimum number of S&S violations necessary. Finally, addressing the ALJ's reasoning that the Secretary failed to identify the groupings of the patterns, they found that, while they recognized that "this [was a] case of first impression," the ALJ prematurely dismissed the POV notice without Brody Mining making a showing of any prejudice that it had sustained due to the Secretary's failure to describe the "patterns."

The case has now been sent back to the ALJ to take evidence and make a ruling based upon the definition of "pattern of violations" set forth by the Commission. Going forward, this Commission decision will allow MSHA more leeway in utilizing POV notices as an enforcement method, one which has been successful thus far. Since modifications of the POV regulations began in 2010, the POV tool has been a very effective one for MSHA. According to a release from the Secretary of Labor, "the number of mines identified in annual screenings for POV actions dropped from 51 in 2010 to 1 in 2015" and, during the same time period, "the number of S&S violations issued to the top 200 mines dropped about 40 percent."

MSHA's Public Hearing on Refuge Alternatives for Underground Mines

By: Sarah Korwan, Esq.

On October 19, 2015, MSHA held a public hearing at the National Mine Health and Safety Academy in Beaver, West Virginia, to allow comments on refuge alternatives for underground mines. MSHA focused the hearing on the challenges related to built-in-place refuges; miners communicating while using breathing devices during escape; and status of new technology or recent research related to the installation and use of built-in-place refuges. The panel was moderated by Sheila McConnell, Acting Director, Office of Standards, Regulations, and Variances, MSHA. Panel members included Rodney Adamson, MSHA's Coal Mine Safety and Health, Wes Shumaker, MSHA's Approval Certification Center, Technical Support, and Steve Turow, Office of Solicitor. Joe Main, Assistant Secretary of Labor for Mine Safety and Health, was also present and made a brief statement regarding. Members of the National Institute for Occupational Safety and Health were also present.

During his remarks, Mr. Main noted that the purpose of the public meeting was to explore new technologies related to alternative refuges. Specifically, development is still challenged in the area of providing fresh air to trapped miners as is communication between miners while wearing a mouth piece attached to their breathing apparatus. Main noted that the industry has had six years to develop this technology, fortunately, there has not been any need during that period to determine the efficacy of the developments. Mr. Main also reiterated the statement made by Ms. McConnell that, MSHA considers long-term shelter in a refuge alternative as a last resort to protect person who are unable to escape from an underground mine.

Comments were presented by six speakers who represented industry, government and academia. More than one speaker suggested that the December 2018 deadline for approval of a commercially available refuge would be challenging.

Two mining engineering professors from the University of Kentucky, Kyle Perry and Braden Lusk, presented on their research and developments. Dr. Perry briefly discussed their research on the use of expandable polycarbonate material in the construction of a movable wall. The polycarbonate panels, with the structural support from the steel frame, will have to withstand a 15 psi blast similar to a mine explosion.

Dr. Lusk presented on the ongoing research in the area of compressed air lines to make fresh air available in the event miners are trapped. He emphasized that more time is necessary to complete research, development and approval of a complete solution.

Dennis O'Dell, Administrator of Occupational Safety and Health at the United Mine Workers of America also emphasized that miners are taught to escape first, barricade second. In the event escape is not feasible, developing a "hardened room or shelter" with air replacements for their self-contained self-rescuer and/or a fresh air bore hole should be continued. He also noted that the seats in the chambers for members of the United States Senators and Congress are equipped with a full face mask or hood with fresh air which allow communications. The air supply is limited, but he suggested that adapting this for underground use should be considered.

Randall Harris, Technical Support for Mine Safety and Health for the State of West Virginia, urged that there is not a single solution, but multiple, situational specific solutions due to the various and changing mine conditions. Mr. Harris took the panel to task for the delays in the development and rigidity of the approval process, and stressed the need for flexibility creating standards and regulations since each situation and mine is unique.

MSHA will to accept written responses, data, and information for the record from any interested party, including those who did not participate in the public meeting, through November 16, 2015. If your company is interested in submitting comments, our firm is available to assist you. Please contact us at (301) 595-3520.

House Committee Scrutinizes MSHA Activity

By: Adele L. Abrams, Esq., CMSP

On October 21, 2015, the House Workforce Protections Subcommittee held a far-ranging hearing on "Protecting America's Workers: Reviewing Mine Safety Policies with Stakeholders." The meeting, chaired by Rep. Tim Walberg (R-MI), follows up on an initial MSHA oversight hearing in April 2015.

The April 2015 hearing also focused on the introduction of the latest iteration of the Byrd Mine Safety legislation (HR 1926 and S 1145), which would (among other things) increase MSHA criminal penalties, charge interest on any contested penalties while litigation proceeds, bar attorneys from representing both the mine operator and its agents, enhance whistleblower protections, and give MSHA broader subpoena power.

The October 21st hearing included a diverse panel: Dr. Jeffrey Kohler of Penn State University (and former head of NIOSH mine research programs); Steve Sanders, an attorney with the Appalachian Citizens' Law Center (which represents miners in black lung and whistleblower cases); Bruce Watzman, senior vice president of the National Mining Association (NMA); Mike Wright, director of health, safety and environment for the United Steelworkers; and Ed Elliott of Rogers Group, Inc.(representing the National Stone, Sand & Gravel

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Association (NSSGA)).

Chairman Walberg noted that the subcommittee has urged the administration to hold bad actors accountable but also to work with employers and other stakeholders to identify gaps in safety and to implement responsible solutions. He stressed the importance of mining in the United States but urged the industry to do a better marketing job, in order to attract new workers and mining engineers. The Upper Big Branch disaster and its aftermath – including the ongoing criminal prosecution of the company's CEO – was repeatedly referenced by both Walberg and most of the witnesses.

Ranking Minority Member Rep. Frederica Wilson (D-FL) focused her comments on pending black lung legislation, calling the disease "entirely preventable" and referencing scandals including falsification of documents by employers, fraudulent medical professionals who fail to classify illnesses as black lung, and attorneys who withheld vital documents.

Mr. Sanders echoed Rep. Wilson and commented that it is difficult to find attorneys who will handle black lung claims for miners, because the attorney fees are low and are delayed until all appeals are exhausted.

Dr. Kohler testified that implementation of safety and health management systems – such as the NMA-sponsored "CORESafety" program – can be beneficial but the "Journey to Zero Harm" is not without challenges. He called for bringing training practices into the 21st Century, and that principles of human systems integration will increase safety. Kohler also noted that technology sometimes falls short and was critical of the mine refuge chamber requirement (adopted in the 2006 MINER Act following the Sago mine disaster). He said that miners cannot rely on these and that MSHA should focus on in-place shelters instead.

Mr. Watzman also discussed his association's CORESafety program, which is a form of safety and health management program geared toward mining, to prevent accidents before they occur by helping to identify at-risk conditions, practices and behaviors that can lead to accidents. Watzman called MSHA's enforcement initiatives "a reactive approach to safety management that has limited success and will not get us to zero fatalities." He also noted that MSHA has prematurely promulgated regulations that are technology forcing, in advance of needed research, and has misallocated its enforcement resources in a way that wastes adjudicatory action by citing operators for violations that bear little correlation to mine accidents.

There was significant discussion among most witnesses over the use of continuous personal dust monitors in coal mines, which takes effect in February 2016. Some witnesses pointed to confounders while others said that continuous mining machines are releasing both respirable coal dust and silica dust, which present health hazards to miners. Sanders noted that Coal Workers' Pneumoconiosis (CWP) and related fibrosis have been on the rise in the past 15 years, and that the prevalence of the disease is at the highest levels since the 1970s.

Mr. Elliott spoke of the aggregates industry's long commitment to safety and health, stating that the industry incidence rate last year for that sector was 2.08 injuries per 200,000 hours worked, marking the 14th consecutive year in which incidence rates declined. He addressed the NSSGA/MSHA alliance, which has generated a number of effective compliance assistance programs, Safety Alerts, development of instructional videos, and clarification of key standards. He said that the proposed MSHA Civil Penalty Reform rulemaking was confusing and would lead to more disputes, rather than bringing consistency to the citation process. He was critical of the pending MSHA crystalline silica rule (due for proposal in April 2016, according to the agency's regulatory agenda), stating that the current permissible exposure limit was protective of worker health.

NSSGA advocates a paradigm shift, calling for a "Pattern of Compliance" program to offset the "Pattern of Violations" enforcement initiative. Such a program would enable MSHA to grant some form of enforcement credit to operators for outstanding adherence to MSHA standards and for keeping low rates of injuries. This would be similar to the OSHA "Voluntary Protection Program." However, Mr. Wright was critical of OSHA's VPP effort, noting that VPP participants who get a pass on programmed OSHA inspections as a result of their status still have fatalities. Committee member Rep. Todd Rokita (R-IN) is the sponsor HR 2500, legislation to codify the VPP program and noted it could be expanded to MSHA.

NSSGA concluded by calling for revitalization of the agency's provision of compliance assistance to small mines, and expressed regret that MSHA closed its Small Mines Office and folded it into another division.

On behalf of the Steelworkers, Mr. Wright called for passage of the Byrd Mine Safety legislation, a review of Part 46/48 training requirements, and enactment of a safety and health program standard, which was started by MSHA in 2009 but has since languished. He also endorsed expansion of MSHA subpoena power for inspections and investigations, and emphasized the need for strengthened criminal penalties, adding that the penalty for causing the death of a miner is less than damaging a coral reef.

The record for comments on MSHA effectiveness and the pending legislation will remain open for 14 days following the hearing, until November 4, 2015.