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OSHA Enforcement Action Highlights Proof of Abatement Requirement

By Gary Visscher, Esq.

A recent OSHA enforcement case provides a reminder of the potential penalties under the OSH Act for failing to timely or appropriately abate a violation once there is a final order on the violation. OSHA announced in a recent press release that it had assessed an eye-catching penalty of \$816,500 against Formed Fiber Technologies, a Maine-based manufacturer, including penalties for failing to abate a violation which had become final as part of a settlement agreement. OSHA alleged that the company submitted false information and certification of abatement of the violation in December, 2013. OSHA also issued citations for willful and repeat violations against the company.

Under the OSH Act, abatement of alleged violations is not required until there is a final order. If a citation is not contested, it becomes a final order once the time allowed for contesting it (15 working days) expires. The deadline and manner for abatement is included on the citation. Generally the citation states that the employer will submit certification of abatement by the date set in the citation. The citation may also include a requirement that photographs or other evidence of abatement be submitted with the certification.

If the citation is contested, a final order is entered either when the case is settled or a settlement, the settlement or when a

agreement should include a description of the agreed upon date and manner of abatement. Generally such agreements also include a requirement that the employer certify by a date certain that abatement has been completed.

Failure to abate a violation as required by the citation, settlement agreement, or final order of the Commission can result in large penalties, as the case against Formed Fiber Technologies shows. Section 17 (d) of the OSH Act provides for penalties of up to \$7000 per day for each day that the violation is not abated. Generally OSHA does not apply reduction factors other than for size of the business when assessing failure to abate penalties.

A failure to abate notification is appropriate only when the violation was never corrected, that is, when the violation is continuous. If OSHA returns and finds the same violation, the employer may show that the condition was not continuous, that it had been corrected at one point. A recurrence of a violative condition or practice after it has been abated may be a basis for a repeat or willful violation, but is not a failure to abate.

One issue that may arise, particularly in construction and other temporary workplaces, is whether the abatement applies only to the particular instance that was cited, or whether the employer decision is entered by the OSH Review Commission. In the case could be cited for a failure to abate if OSHA later finds the same condition or practice. Generally, a penalty for failure to abate requires

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OSHA Enforcement, cont.

OSHA to show that the identical violation exists which was cited in the original citation. The ambiguity comes in when the citation is not altogether clear and OSHA alleges that abatement means not only correcting the specific instance or instances in the citation, but also preventing any other instances of the same or similar conditions or practices. Such was the case in *Alden Leeds v. OSHRC*, 298 F.3d 256 (3d Cir. 2002). In that case, the employer, which supplied swimming pool chemicals, was cited under the general duty clause for improper storage of certain chemicals; the citation described 13 specific instances where chemicals were not stored in compliance with NFPA or industry standards.

A settlement agreement provided that Alden Leeds agreed to abate all violations alleged in the citation and complaint. Upon re-inspection, although OSHA did not find that the original 13 instances of improper storage, OSHA identified 33 other instances where chemicals were being improperly stored at the facility. The Commission, by 2-1, upheld the failure to abate notification. The Third Circuit reversed, on the grounds that the citation and settlement order referred only to the 13 instances that were identified in the citation. The Court of Appeals also found that the citation and settlement did not give the employer adequate notice that it could be subject to a failure to abate notification if OSHA subsequently found other instances of improper storage.

As the Alden Leeds case highlights, the specific language of the citation and/or settlement agreement is important and should be reviewed carefully so that the employer, as best he or she is able, knows what the abatement obligation is. Unfortunately citations are not always clearly written, and one may want to seek clarification from OSHA. Keep in mind, however, that such "clarifications" may be used against you. A recent Commission case provides an example. The original citation stated that the employer failed to maintain records of regular crane inspections, however the section of the standard that was cited does not refer to maintaining such records. The employer did not contest the original citation, and did not submit abatement verification to OSHA. OSHA subsequently re-inspected the employer and issued a failure to abate notification. Although the judge agreed that the original citation was confusingly written, and the

employer claimed he was confused about what was required, the judge cited evidence that the employer was told during the initial inspection that he was required to maintain inspection records.

The penalty for failing to abate can quickly dwarf the penalty for the original citation – in the case just referred to (*Schmitt Tree Experts*, ALJ, 5/27/2014), the penalty for the original citation was \$1020. OSHA proposed a penalty of \$36,000 for the failure to abate, though the ALJ reduced it to \$9180. Employers who receive OSHA citations are often relieved when they can "put the matter behind them" with entry of a final order and paying whatever penalty applies. Both the *Schmitt* case and the enforcement action against *Formed Fiber Technologies* described earlier are reminders that employers should not forget or overlook timely and accurate submittal of abatement certification and documentation.

Administration Steps Closer to Expansion of Overtime Eligibility By Amged M. Soliman, Esq.

As first noted in the April 2014 Newsletter, President Obama issued a March 13th memorandum to the Secretary of Labor regarding the expansion of overtime eligibility, directing the Secretary to evaluate and modernize the overtime exemption for select executive, administrative, and professional employees (what is known as the "white collar" exemption). Thereafter, as part of the process of the administration's rule-making authority, the Small Business Administration announced two specific, crucial standards that might change the exemption and held a roundtable discussion to solicit feedback regarding 1) an increase in the pay threshold for the exemption; and 2) the duties test for those who qualify.

Currently, the pay threshold for the exemption is \$455 per week or \$23,660 per year. This might change to a threshold of \$50,000 per year thereby switching otherwise entitled employees making between 23,660 to \$50,000 per year from ineligible to eligible for overtime pay (1.5 times the pay rate for those working over 40 hours per week). Further, the duties test for those exempt from overtime pay might change from a standard of managing a company and supervising two employees, to a quantification of exempt work whereby concurrent duties are not

Overtime, cont.

permitted under the exemption. The official proposal of any such changes will be drafted within the next few months before formal comments will be welcomed. However, members of the business community have already outlined the challenges they expect with these new developments.

The primary concern of course involves the increased expense to businesses. With the already increasing prices of commodities and healthcare, this added cost is likely to get passed on to the consumer thereby decreasing demand, or result in increased layoffs that threaten the viability of a business. At the very least the compensation of many workers will be changed from salaried to hourly or a more incentive based system. These changes are likely to affect not only employee morale, but their growth within the company as well.

There is also concern that the change in the duties test might result in ambiguity. What does it mean, exactly, to be a manager with concurrent duties? For example, if a manager of the waiting staff at a restaurant also works as the hostess, will she be exempt? How about if a manager at a sandwich shop also makes and serves sandwiches along with the people he manages, will he be exempt? In the coming months, such questions and others will have to be answered and businesses will have to prepare for coming changes.

OSHA Extends

Recordkeeping Comment Period

By Adele L. Abrams, Esq., CMSP

On November 8, 2013, OSHA issued a proposed rule that would require most employers to electronically report their injuries and illnesses to the agency and the data would be posted on the OSHA website. OSHA has now reopened the comment period, until October 14, 2014, to seek input on the following issues:

- (1) what are the costs and benefits of OSHA using this rule to address the issue of employers who discourage workers from reporting injuries and illnesses (e.g., through incentive or discipline programs);
- (2) what other actions can OSHA take to address the issue of employer discouragement of reporting;
- (3) how can OSHA clarify the requirement that

employer 's injury and illness reporting requirements are reasonable and not unduly burdensome; and,

(4) should there be employee training on their rights to report injuries and illnesses.

In addition, OSHA has guidance on its website (www.osha.gov) on current reporting requirements, which can be complicated for multi-employer and temporary or multiple worksites. The following are examples of such guidance:

Question 1: Does each site operated and controlled by a client at which employees are assigned constitute an "establishment" of the Company? Is the Company required to maintain a separate OSHA 300 log at each client site?

Answer 1: Employers must keep a separate OSHA 300 log for each establishment that is expected to be in operation for one year or longer. On the other hand, short-term establishments, employers are required to keep injury and illness records, but are not required to keep separate OSHA 300 logs. Instead, employers may keep one OSHA 300 log covering all short-term establishments, or they may include short-term establishment records in logs that cover individual company divisions or geographic regions.

Question 2: Under the facts stated above, is the Company permitted to maintain OSHA 300 logs for its employees working at client-controlled locations at its central headquarters?

Answer 2: Yes. Employers can keep injury and illness records for all establishments at their headquarters or other central locations. However, this is only permitted when the employer can produce copies of the injury and illness forms when access to them is needed by a government representative, an employee or former employee, or an employee representative.

Question 3: How should the Company record injuries and illnesses that occur to employees working at a remote location not associated with a company-owned or leased building, or with any client site?

Answer 3: Recordable injuries or illnesses sustained by an employee at a remote location must be recorded on that employee's home establishment's OSHA 300 log. In cases where employees work at several different locations, or do not work at any establishment, each

Recordkeeping, cont.

employee must be linked, for OSHA recorded it for keeping purposes, to one of the employer's establishments.

Question 4: Does posting the OSHA 300-A Summary Form electronically for all employees to review satisfy OSHA's posting requirements?

Answer 4: No. Employers must post a hard copy of the OSHA 300-A form at each of their establishments in a conspicuous place where notices to employees are normally posted in the workplace.

Question 5: How should the Company satisfy its obligation to post the annual summary with respect to employees that work at remote locations not affiliated with a company-owned or leased building, or a client site?

Answer 5: An annual summary posted at the employee's home (or linked) establishment will satisfy this requirement.

Settlement Affirms OSHA's GDC Citation For Exposures Below PEL By Adele L. Abrams, Esq., CMSP

On July 31, 2014, OSHA announced that Fiberdome, Inc., a Wisconsin employer, agreed to pay a \$2,000 penalty for a general duty clause citation issued by the agency for worker exposures to styrene that were below OSHA's permissible exposure limit (PEL) of 100 ppm but were above its industry's recognized 50 ppm level. The employer agreed to abate the citation by adhering to the styrene industry's 1996 agreement to voluntarily adopt the lower exposure limit for an 8 hour time-weighted average. If the 50 ppm level cannot be reached through engineering and administrative controls, then an effective respiratory protection program will also be required.

The case is highly significant because there was technical compliance with the legally enforceable OSHA PEL, and because the agency has enforced what was a voluntary proactive initiative by an industry against one of its member employers. This settlement will likely encourage similar citations in industries where "best practices" have been adopted that go beyond technical compliance with OSHA standards, many of which are outdated and do not reflect the best technology or science concerning chemical exposures. The impact on industry alliances with OSHA, where a number of such

"best practice" work products have been generated, remains to be seen.

The General Duty Clause (GDC), Section 5(a)(1) of the Occupational Safety and Health Act of 1970, is intended as a "gap filler" to address recognized hazards that OSHA has not yet regulated. To establish a violation of the GDC, the Secretary of Labor must prove: (1) that the employer failed to render its workplace free of a hazard which was (2) "recognized" and (3) causing or likely to cause death or serious physical harm and (4) that feasible means exist to free the workplace of the hazard. All GDC citations are serious in nature (although they can also be classified as willful or repeat) and they can only be issued if the employer's own employees have exposure to the hazard. The Protecting America's Workers Act, if adopted, would expand GDC citation powers to allow citations to a host employer or general contractor even if their employees had no hazardous exposures, as long as a contractor or subcontractor on site had exposed workers.

To substantiate employer knowledge of a "recognized" hazard that has potential to cause death or serious bodily injury, OSHA looks at the employer's own documents, contractual materials, industry guidance, voluntary consensus standards, manufacturer's recommendations, and also "common sense" factors, among others. A 2003 OSHA enforcement memo is relevant to the action taken in Fiberdome. It maintains that the agency cannot enforce a stricter limit than that adopted by OSHA, unless the "employer knows" that the standard is inadequate to protect workers.

There was also a General Dynamics case (815 F.2d 1570, DC Cir. 1987) in which the US Court of Appeals reversed OSHRC and reinstated a GDC citation where workers were exposed to Freon at levels below those in 29 CFR 1900.1000. In that case, the DC Circuit held that a standard does not preempt the applicability of the GDC "if an employer knows that [the] specific standard will not protect his workers against a particular hazard." Previously, the OSHRC had held that a GDC citation would not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. When no specific standard entirely protects against the hazard alleged, citation under Section 5(a)(1) is proper.

Exposures Below PEL, cont.

In applauding the Fiberdome settlement, OSHA's area director stated: "OSHA believes that employers have the responsibility to further limit exposure to chemicals that can harm employees even if the level of such exposure is below OSHA permissible exposure limits." At the time that the citation was issued, in September 2013, OSHA also issued a news release, which noted: "Companies must be aware of the hazards that exist in their facilities and take all possible precautions to minimize the risk of illness." In Fiberdome, the inspection was triggered by a referral with information that workers were becoming ill from styrene exposure even at the legal limits.

The Fiberdome enforcement action also raises the potential for OSHA to use guidance on chemical manufacturers' Safety Data Sheets (SDSs) as a basis for imputing knowledge to employers in the future, if the SDS recommends exposure limits more protective than those adopted by OSHA in its air contaminants rules, or where OSHA lacks any PEL for a chemical substance.

Moreover, in recent months, OSHA published on its website "permissible exposure limits annotated tables," intended to provide employers and workers with alternate occupational exposure limits that may protect employees better than OSHA's adopted PELs. These include Cal/OSHA PELs, the NIOSH Recommended Exposure Limits (RELs), and the most current ACGIH Threshold Limit Values (TLVs) among others. Whether OSHA will seek to enforce these more protective standards in light of the agency's success in Fiberdome, by imputing knowledge to the regulated community through their publication on the OSHA website, remains uncertain. If this approach to enforcing more protective exposure limits proves successful, it could be a solution to OSHA's quandary of updating hundreds of PELs individually through the laborious rulemaking process.

MSHA Extends Comment Period for Proposed Civil Penalty Rule

July 31, 2014, MSHA issued its Proposed Rule for the Criteria and Procedures for Assessment of Civil Penalties. This proposed rule introduced MSHA's plan to redesign the citation and order format, in addition it will likely have wide spread affects for industry and the contest process. Initially the proposed rule included a

60 day public comment period for any person, party or group to voice their opinion regarding the rule. Due to requests by industry stakeholders, MSHA has extended the public comment deadline from September 29 to December 3, 2014.

The link to the official extension is below, which includes the different means through which one can submit a comment. If you have any questions or concerns regarding the comment process, or need assistance in crafting your comments, please contact the Law Office for assistance at 301-595-3520 (eastern office) or 303-228-2170 (western office).

Changes to Injury Reporting At OSHA By Gary Visscher, Esq.

The Occupational Safety and Health Administration (OSHA) has issued an important new final rule affecting employers' injury and illness reporting requirements. For employers in federal OSHA jurisdictions, the new rule takes effect on January 1, 2015. Employers in state OSHA plan states may a different effective date, depending on the particular state, but all state plans must adopt the new rule no later than January 1, 2016.

In general, the new rule affects two parts of OSHA's recordkeeping and reporting requirements, which are codified in Part 1904. First, it changes the list of industries that are exempt from OSHA recordkeeping requirements. OSHA's current recordkeeping rule includes, in Appendix A, a list of 56 industry groups, identified by 2 or 3 digit SIC number, in which employers are exempt from the recordkeeping requirements. The industry groups generally involve less hazardous work; in order to be on the list, an industry group must have an average "days away, restricted work or transfer" rate that is less than 75% of the average rate for all private industry. The current list of exempt industries was compiled and published in 2001, based on 1996-1998 injury data.

The new rule replaces the list of 56 industry group identified by SIC number with a list of 82 industry group identified by 4 digit NAICS number, and uses data from 2007 to 2009. While that may at first appear to increase the number of employers exempt from recordkeeping, in fact OSHA estimates that the number of exempt

employers will decrease by a net 80,000 establishments. According to OSHA, 199,000 establishments that were previously exempt will now have to keep records, and 119,000 establishments previously covered will now be exempt from recordkeeping.

(Note: employers in exempt industries must keep records if required to do so by the Bureau of Labor Statistics, for purposes of its annual survey, or if notified to do so under OSHA's Data Initiative. Also, the new provisions regarding which employers must maintain records do not affect the separate exemption for employers who employ fewer than 10 employees throughout the year.)

While the first change will affect those industries and establishments that change from exempt to non-exempt or vice versa, the second change brought about by OSHA's new rule affects all employers who are covered by OSHA. OSHA's current regulation, 1904.39, requires employers to report any work-related death or incident resulting in hospitalization of 3 or more employees to OSHA within 8 hours of the incident. The report may be filed with the OSHA area office or by calling a toll-free 800 number.

Under the new rule taking effect in January, employers are required to report any work-related death within 8 hours, and any work-related hospitalization, amputation, or loss of an eye within 24 hours. The report may go to the OSHA area office, or by the toll free 800 line. OSHA also says employers will be able to use an on-line reporting application that will be available on its website.

The new rule defines "hospitalization" as "in-patient admission that involves care or treatment." It does not include emergency department-only treatment, nor does it include in-patient admission that is only for observation or diagnostic testing.

In addition to reporting all hospitalizations, under the new rule employers are required to report any amputation (regardless of whether it results in a hospitalization) and any enucleation (loss of an eye). OSHA defines an amputation as "a traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached."

OSHA estimates that the broader reporting require-

ments will result in a 30-fold increase in the number of reports being filed with OSHA. OSHA acknowledges that it will not be able to inspect every report or every reported incident. However, OSHA claims that it will determine, on a case by case basis, whether to conduct an inspection, respond by phoning or faxing the employer for further explanation, or "provide compliance assistance materials." OSHA has also stated that it plans to publish the reports on its website, presumably after the submitted information has been scrubbed to remove privacy concerns. If you have any questions about the new requirements, or about OSHA recordkeeping and reporting requirements in general, please let us know.

Sixth Circuit Decision Leaves Mining Industry With Few Options to Fight POV Rule

**By Justin M. Winter, Esq. &
Tina Stanczewski, Esq., MSP**

On August 19, 2014, the U.S. Court of Appeals for the Sixth Circuit decided that the Court lacked subject matter jurisdiction to hear the challenge by various mining organizations and businesses on the Mine Safety and Health Administration's ("MSHA") pattern of violations ("POV") rule that was revised in 2013. The Court dismissed the challenge rather than transferring it to the district court.

The crux of the Sixth Circuit decision entailed its ability to hear challenges to non-mandatory health and safety standards. The Mine Act distinguishes between mandatory standards (such as Part 56 regulations for M/NM surface mines or Part 57 for underground M/NM) and non-mandatory standards to which the Court categorized the POV rule.

The challenge by industry asserted that the Court could hear all substantive rulemakings, of which the POV rule arguably falls and also that the POV rule functions as a mandatory health and safety standard. The Court dismissed these arguments and asserted that the Mine Act only permits jurisdiction in the federal appellate courts (to which the Sixth Circuit falls) in two distinct situations. The first situation is the most common whereby an operator is cited for violating the Mine Act, seeks relief at the Commission level, and then MSHA or the operator appeals to the Court of Appeals for review of the Commission-level decision. The second is when a person challenges a mandatory health and safety standard at the appellate level because of its effect on the operator and/or industry.

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POV, cont.

Prior to the revision, only final orders of issued citations counted towards POV assessments. Therefore, an operator, through a 10 day conference or litigation had the ability to challenge and thereby modify the issued citation. If the modification changed the designation from one that counts towards POV status, then the operator's risk of POV status decreased.

The revision uses issued citations as the basis for assessment of POV status. This means everything that meets the criteria for POV will count towards POV status, whether or not it is vacated or modified after issuance. The industry views this as a removal of the operator's due process right. Further, under the old rule, the operator received a warning that POV status may occur. This allowed the operator time to implement a corrective action plan and correct the perceived deficiencies.

Today's rule permits MSHA to issue a POV notice to the operator stating that the mine meets the POV criteria. During a subsequent MSHA inspection, if the inspector issues an S&S violation within ninety days of the POV notice, a withdrawal order can be issued. This ruling leaves the industry with limited choices. It is possible to refile the case in district court or litigate the issue at the Commission on behalf of an operator who is placed in POV status.

For additional information on POV, contact the Law Office.