



2015 OSHA Developments and Legal Review

PPSA Safety & Health Conference

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Eric E. Hobbs

eehobbs@michaelbest.com

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**PPSA SAFETY AND
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New OSHRC Commissioner



Heather
MacDougall

- Sworn-in as OSHRC Commissioner – April 2, 2014
- Term Expires – April 27, 2017
- Fills seat previously held by Horace A. “Topper” Thompson
- Former Chief Legal Counsel/Special Advisor to OSHRC Scott Railton in early 2000s
- Management lawyer; Republican representative
- OSHRC at full strength, but there’s a backlog of cases

OSHRC Commissioner Retirement



Thomasina
Rogers

- Retired effective April 27, 2015
- No replacement named as yet.
- Three-term member of Commission; Chair during Clinton Administration and throughout Obama Administrations.
- Former Chair, Administrative Conference of the United States.
- Former Counsel, Equal Employment Opportunity Commission.

OSHA Solicitor Update



Ann
Rosenthal

- New Associate Solicitor of Labor
- Was previously Acting Associate Solicitor of Labor
- Formally replaces retired Joe Woodward

Rulemaking – Final Rules “Planned”

- Most recent agenda published in Spring 2015
- “Final Rule Stage”:
 - Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention)
 - Updating OSHA Standards Based on National Consensus Standards Eye and Face Protection
 - Improved Tracking of Workplace Injuries and Illnesses
 - Approved State Plans for Occupational Safety and Health
 - Procedures for Handling Employee Retaliation Complaints Under the National Transit Systems Security Act; Surface Transportation Assistance Act; and Federal Railroad Safety Act

Rulemaking – Final Rules “Planned” (cont’d)

- “Final Rule Stage”:
 - Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records
 - Procedures for the Handling of Retaliation Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, as Amended
 - Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act of 2010
 - Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Moving Ahead for Progress in the 21st Century Act



Rulemaking – Proposed Rules in Pipeline

- Beryllium
- Amendments to Crane and Derricks in Construction
- Clarification of Employer's Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness
- Crane Operator Qualification in Construction
- Standards Improvement Project IV
- Updating OSHA Standards Based on National Consensus Standards Eye and Face Protection

Rulemaking – Other Rules in Pipeline

- Chemical Management and Permissible Exposure Limits (pre-rule)
- Bloodborne Pathogens (pre-rule) (findings from review of the standard expected in May 2015)
- Combustible Dust (pre-rule)
- Process Safety Management and Prevention of Major Chemical Accidents (pre-rule)
- Updating of PELs (pre-rule)
- Communication Tower Safety (pre-rule)

Rulemaking - Reporting

- September 2014 OSHA released final rule that requires:
- **Effective January 1, 2015** - Employers must notify OSHA of:
 - Work-related fatality within 8 hours
 - Work-related in-patient hospitalization, amputation or loss of an eye within 24 hours
- Prior rule required employer to notify OSHA within 24 hours of:
 - Work-related fatality
 - In-patient hospitalizations of 3 or more employees



Rulemaking – Reporting (cont'd)

- September 2014 rule also modifies list of employers partially exempt from OSHA record-keeping requirements.
- Industries that have historically low injury & illness rates (e.g. publishing; telecommunications).
- Bonus rule: OSHA now applies the [North American Industry Classification System](#) (NAICS) to classify establishments by industry.
- Previously, OSHA applied the Standard Industrial Classification System (SIC).

Rulemaking – Confined Spaces - Construction

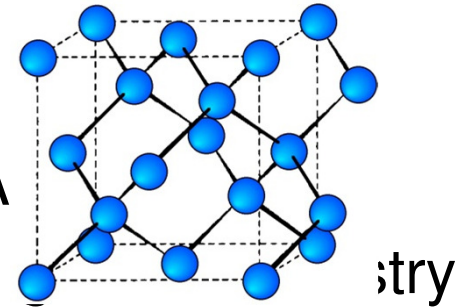
- May 4, 2015 – OSHA publishes final rule –long-awaited.
- Effective August 3, 2015.
- Highlights:
 - Definition essentially identical to one in 29 CFR 1910.146.
 - Written program prior to entry.
 - On jobsites with PRCs but no employee entry, employer must take steps to prevent entry.
 - Controlling, not host, employer on point for information about PRCs on site.

Rulemaking – Confined Spaces - Construction

- Highlights (cont'd):
 - Employers on multi-employer sites must share information.
 - On sites with PRCSs under construction and general industry standards, construction standard must be followed.
 - On jobsites with PRCS but no employee entry, employer must take steps to prevent entry.
 - Does not apply to work in excavations, to work in underground construction, caissons, cofferdams, or to diving.

Rulemaking – Crystalline Silica

- Notice of proposed rulemaking published in A
- Would create a “vertical” standard for silica in industry and in construction.
- Would establish PEL of 50 micrograms per cubic meter of air (50 $\mu\text{g}/\text{m}^3$)
- If employees reasonably might be exposed at/over PEL, would require air sampling every six months until two consecutive assessments show under PEL.



Rulemaking – Crystalline Silica (cont'd)

- Would require establishment of “regulated area” or “written access control plan.”
- Construction employers given option of implementation of and adherence to engineering and work practice controls as specified in table to proposed construction standard.
- Comment period repeatedly extended; closed February, 2014.
- Public hearings wrapped up in April, 2014

Rulemaking – Electric Power Generation, Transmission, and Distribution

- No April Fool's Joke: on April 1, 2014 OSHA announced final rule updated its 42-year-old construction standard for electric power line work.
- The new rule aligns OSHA's electricity construction standard with present industry consensus standards.



Rulemaking – Electric Power Generation, Transmission, and Distribution (cont'd)

Highlights:

- All employers on project must share safety information and coordinate work rules and procedures
- Employees must be provided PPE to protect from electrical arcs no later than April 15, 2015
- Line-clearance tree trimmers must be training on recognizing and avoiding electrical hazards
- Fall protection required starting April 15, 2015, unless use of same poses a greater hazard

Rulemaking – Electric Power Generation, Transmission, and Distribution (cont'd)

Highlights:

- Multiple crews must coordinate activities under single “supervisor” or independently comply with standards
- New minimum approach distances, effective April 15, 2015
- Recognition of new class of electrical protective equipment – Class 00 rubber insulating gloves



Rulemaking – Mechanical Power Presses

- OSHA published a direct final rule, revising records in the Mechanical Power Press Standard.
- OSHA stated it would confirm rule absent significant adverse comments.
- No such comments => effective as a final rule on February 18, 2013.

Rulemaking – Mechanical Power Presses (cont'd)

- Summary
 - Standard aligned with ANSI mechanical power press standard.
 - Employer must complete maintenance and repairs before mechanical power press operated.
 - Employer must certify maintenance and repair for entire machine, rather than just certain parts.
- Eliminates requirement for employer to document mandatory weekly inspections of mechanical power presses.
- Inspections still required; best practice is to document.

Rulemaking – I2P2 (Pre-rule)



David
Michaels

- Assistant Secretary of Labor for Occupational Safety and Health Determined to leave legacy – I2P2 is capstone
- In January 2012, OSHA released white paper, confirming I2P2 as a major priority for the agency.
- Recently said that, although I2P2 has been relegated to OSHA’s long-term action list, he’s still working hard on it.

Rulemaking – I2P2 (Pre-rule) (cont'd)

- Problems:
 - NOT performance-based: Would require every employer to have written safety and health program.
 - One-size-fits-all syndrome
 - Vehicle for ergonomics (require employers to do hazard risk-assessment including for ergonomic risks)?
 - Double jeopardy for employers: violation = bad program.
 - Contradictions/reversals of old policy guidance included (*e.g.*, employer self-audits)
- Subject to congressional oversight – in the works

Rulemaking – PSM (Pre-rule)

- August 1, 2013 – Executive Order 13650
 - Established Chemical Facility Safety and Security Working Group – OSHA a part.
 - Working Group charged with developing options for improving safety/security of chemical facilities
 - OSHA charged with “modernizing” PSM Standard
- December 9, 2013 - Request for Information
- SBREFA Panel to be noticed June 2015 (convened 90 or so days later)
- NPRM – scheduled for September 2015 (unlikely)

Rulemaking – Injury/Illness Reporting (Proposed)

- “Improved Tracking of Workplace Injuries and Illnesses”
– Notice of Proposed Rulemaking published November 2013
- Comment period closed October 14, 2014
- Would require quarterly reporting (250 or > employees) and annual reporting (20 or > employees) of all illness and injury data to OSHA for publication on OSHA website.
- Clear goal: shaming

Rulemaking – Injury/Illness Reporting (Proposed) (cont'd)

- Problems
 - Not authorized by 1910.1904 or OSHA Act.
 - Would disclose confidential information on employers and employees and proprietary information (hours worked).
 - Result in competitive injury.
 - Would not provide tools for understanding/use of data.
 - No allowance for correction of data (work-relatedness; DAFWIs; DARTs; ...).

Rulemaking – Crane Operator Qualification (Proposed)

- 2010 – OSHA proposed new standard
 - Established crane operator certifications as sole criterion for operator safety – almost always provided by third party testing entities.
 - Stakeholders: Certification by itself does not establish experience/competence.
- March 3, 2015 – OSHA postponed operator certification deadline to clarify issues surrounding operatory certification, including "type and capacity" requirement.

Rulemaking – Eye, Face PPE (Proposed)

- Notice of Proposed Rulemaking - March 13, 2015
- Would adopt ANSI Z87.1-2010 for *all* industries.
- Would revise construction standard to align with other industries' standards.
- Old gear grandfathered so long as complies with 1989, 2003 (not 1968) ANSI standards.
- Comment period closed April 13, 2015.

New Directive – Communications Towers

- OSHA has been focusing on cell tower safety; standard in pre-rule stage.
- On July 24, 2014, OSHA issued new directive that updated a 2002 enforcement policy, which only covered the hoisting of workers to workstations during new tower erection activities.
- Covers any work on a communication tower - including maintenance and construction - that involves the use of a hoist to lift workers from one elevated workstation to another.
- Addresses how to use hoists; fall arrest systems, and includes detailed information on how to hoist people safely.

Enforcement Activities – Kinesiology Tape/Recordability

- First aid v. medical treatment under 29 CFR 1904.7?
- December 12, 2014, Letter of Interpretation:
 - Tape designed to reduce pain “through physiological and neurological mechanisms by relieving pressure on pain receptors directly under the skin”.
 - Therefore, like physical therapy.
 - Therefore, use of tape is medical treatment beyond first aid.
 - Therefore, recordable under 29 CFR 1904.7(5)(ii)(M).
- But elastic bandages, wraps, non-rigid back belts not medical treatment/recordable. 29 CFR 1904.7(b)(5)(ii)(F)
- ????

Enforcement Activities - SVEP

- SVEP (“Severe Violator Enforcement Program”).
- Following circumstances will be reviewed for possible handling as SVEP case:
 - Fatality or catastrophe with one willful or repeat citation or failure-to-abate (FTA) notice;
 - Industrial operations or processes exposing employees to “high-emphasis hazards”, with two or more high-gravity willful or repeat citations or FTA notices;
 - Exposure of employees to hazards related to potential release of highly hazardous chemical, with three or more high-gravity willful or repeat citations or FTA notices; or
 - An egregious (per-instance/ per-employee citation) enforcement action.

Enforcement Activities - SVEP (cont'd)

- SVEP “action elements” for employers who meet SVEP criteria:
 - Enhanced follow-up inspections
 - Nationwide referrals, to include state plan states.
 - Increased publicity, to include news releases
 - Enhanced settlement provisions (*e.g.*, full time safety specialist, inspections without warrant, reports to OSHA)
 - Increased use of federal court enforcement action (contempt of court) under Sec. 11(b) of OSH Act (one case referred to Solicitor/filed with court)
 - Corporate-wide settlement agreements

Enforcement Activities - SVEP (cont'd)

- Big problem: how to get out of SVEP once in it?
- Employer must ask.
 - Three years since “final disposition” of SVEP case
 - No citations since for similar alleged violations; otherwise three more years before reevaluation
 - After follow-up inspection (abatement)
 - In discretion of Region if no corporate-wide settlement; in discretion of OSHA HQ otherwise
 - Public log – deletion/line-out

Enforcement Activities – National Emphasis Programs - Others

- Other NEPs
 - Nursing and Residential Care Facilities
 - Chemical Plants (PSM)
 - Primary Metals
 - Shipbreaking
 - Hexavalent Chromium
 - Food Flavorings/Diacetyl
 - Lead

Enforcement Activities – National Emphasis Programs – Others (cont'd)

- Other NEPs (cont'd)
 - Combustible Dust
 - Crystalline Silica
 - Amputations
 - Trenching
 - Isocyanates (under development)

Enforcement Activities – Incentive Program Directive

- OSHA hates incentive/disincentive programs based on belief they discourage injury/illness reporting – “intentionally or unintentionally”.
- Culprit programs subject to scrutiny/citation are “blame the employee” programs.
- Focus should not be on fact/frequency of injury:
 - Underlying conduct leading to injury
 - Accounting for near misses

Hot Issues

- Workplace Violence
- Health Hazards
- Heat campaign
- Fall Protection campaign
- Customer Service



Executive Order Requiring Safety History Disclosure

- July 31, 2014 –Executive Order 13,673, “Fair Pay and Safe Workplaces”
- Requires federal government contractors to disclose labor violations under ADEA, FLSA, FMLA, OSHAAct, NLRA, others, for every procurement contract valued at \$500,000 or more.
- Provides discretion to contracting officers to determine whether unsatisfactory contractor should be referred to agency suspending and debaring officials.

Enforcement Activities – Whistleblower

- Investigators now must make “every effort to interview complainant; intake supervisor must insure coverage requirements *prima facie* case elements identified.”
- New guidance to ensure consistency and quality of investigations
- Rulemaking in works regarding procedures.
- April 20, 2015, Memorandum: “Reasonable cause” standard lower than “preponderance of the evidence” standard for proof in investigation – could “reasonable judge” find in favor of complainant?



Enforcement Activities – Whistleblower (cont'd)

- April 20, 2015, Memorandum
 - “Reasonable cause” standard lower than “preponderance of the evidence” standard for proof in investigation –
 - Could “reasonable judge” find in favor of complainant?
- Controversy: OSHA using quotas for whistleblower investigators in Region IX?
 - Internal email from supervisor to investigator
 - Must complete five investigations per quarter – focus on quick close-out
 - Claim of bonuses for supervisors based on numbers of investigations

Enforcement Activities – Whistleblower (cont'd) – NLRB & OSHA Coordination

- March 6, 2014, MOU: OSHA to notify all complainants who file untimely whistleblower charge of right to file charge with NLRB.
- 300-600 OSHA whistleblower complaints per year untimely under 30-day statute of limitations of Section 11(c) of OSHAct.
- Complaint may include claims under NLRA (e.g., retaliation for group complaints concerning unsafe working conditions); NLRA has six-month statute of limitations.