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Workplace Safety and Health Update

Week of **May 19, 2014**

Federal Court Sides with OSHA on Machine Guard Standard

In a split decision, the U.S. Court of Appeals for the Eighth Circuit, in St. Louis, has sided with OSHA on its interpretation of a machine guarding standard, 29 CFR 1910.212(a)(1). *Perez v. Loren Cook Company*, No. 13-1310 (8th Cir. May 9, 2014). The standard describes methods of machine guarding designed to protect the operator and other employees in the area from hazards, some of which are enumerated.

A majority of a three-judge panel held that the agency's interpretation of 29 CFR 1910.212(a)(1) was reasonable and deserved deference. Therefore, the Court granted OSHA's petition for review, overturned an order of the Occupational Safety and Health Commission and remanded the case for further review. However, the dissenting judge reached the opposite conclusion, and said he would deny OSHA's petition and affirm the Commission's order.

The case stemmed from the death in May 2009 of an employee of the Loren Cook Co., a manufacturer of air circulating equipment. The employee was killed when he was struck on the head by a 12-pound workpiece which flew from an unguarded lathe he was operating. The lathe once had protective guards, but by the time of the fatality, the company had removed all of them from its small lathes. OSHA contended the lathes should have been guarded and issued seven violations under the standard. At $70,000 apiece, the fines came to $490,000.

The Missouri-based company appealed, in part claiming OSHA's interpretation was novel and thus unreasonable. After a 20-day hearing, an administrative law judge (ALJ) issued a decision siding with the employer, saying the standard did not apply because it pertained to ejected debris, not ejected workpieces. He also held the standard was intended to apply to normal operations, not malfunctioning situations, as had occurred in the accident. The ALJ's decision became a final order after the Commission declined OSHA's request to review it. The Secretary of Labor then went to the appeals court on behalf of the agency.

The panel majority held that in disputes between the agency and the Commission over the interpretation of standards, the agency's view deserved deference. It also found the agency's interpretation that the standard contained no limitations to be supported by the text and reasonable. Accordingly, it deserved deference, the majority ruled.

"The Secretary's interpretation comports with the plain language of the statute …," the majority wrote, adding that "Loren Cook is wrong to suggest that a change of regulatory interpretation by the Secretary must be viewed as *per se* unreasonable." Nonetheless, the two judges said they were "not unsympathetic" to the company's argument that the fine was unfair because of inadequate notice from OSHA of the agency's changed interpretation.

The dissenting judge said the Secretary's interpretation was not reasonable. He argued the Secretary could not demonstrate that he consistently interpreted the standard as applicable to large objects ejected from a lathe. Moreover, the judge declared the Secretary's "unprecedented interpretation" that imposed a $490,000 fine constituted unfair surprise, and the interpretation "strains a common-sense reading" of the text of the standard.

The judge relied on a similar case from the U.S. Court of Appeals for the Second Circuit, in New York, which had interpreted the regulation narrowly, concluding it did not apply to a thrown workpiece and recognizing a distinction between "normal" and "abnormal projectiles."

He also noted OSHA had acquiesced in that decision for an extended period, failing to act even when it had prior knowledge of the company's manufacturing operations. When an agency "then changes its interpretation to sanction conduct that occurred prior to the new

interpretation, 'there are strong reasons' for withholding deference," the judge said, citing a prior case.

He added, "The Secretary's hyper-literal interpretation of a hazard created by rotating parts defies logic and seems to permit section 1910.212(a)(1) to apply to virtually any situation, no matter how remote, in which a hazard can be tied to some movement on a machine."

Mining Association Seeks Stay of Coal Dust Rule

The National Mining Association (NMA) wants MSHA to stay the effective date of its final rule to control miners' exposure to respirable coal dust pending the outcome of litigation over the rule. However, MSHA quickly denied the NMA request.

Jackson Lewis attorneys filed suit against the agency in the U.S. Court of Appeals for the Eleventh Circuit on behalf of NMA, Alabama Coal Association, Walter Energy and Warrior Coal Co. Previously, Murray Energy Corp. and its subsidiaries filed a petition for review in the U.S. Court of Appeals for the Sixth Circuit which has now been transferred to the 11th Circuit. .

NMA's Bruce Watzman wrote MSHA Assistant Secretary Joe Main seeking the stay, stating that "various pieces of the rule simply do not fit together."

"[T]he implementation schedule and the new requirements are misaligned and, as a result, preclude a fair and proper opportunity for coal mine operators to comply with the rule. In many cases, compliance will be infeasible," said Watzman, NMA's Senior Vice President for Regulatory Affairs. The regulation is set to go into effect in stages over the next two years.

Watzman pointed to the requirement, effective August 1, whereby operators must take "immediate corrective actions" based on existing sampling technologies, which cannot provide results instantaneously. A device that can provide near instantaneous measurements, the CPDM, is not mandated for use until February 2016. Therefore, the requirement is impossible to achieve.

He also called attention to the requirement to use a single dust sample to determine compliance, a change that can only be made through joint MSHA/NIOSH rulemaking, which did not occur.

There is a "high risk of inaccurate results," he told Main, adding that the approach makes meeting the reduced dust concentration standard in the rule infeasible. Surprisingly, his concern was echoed by Cecil Roberts, head of the United Mine Workers of America (UMWA).

While offering his union's "qualified support" for the rule in a statement released May 12, Roberts said, "We wonder ourselves how things like the single-shift sample that will be done by MSHA to enforce compliance will work, and if there will be undue adverse consequences from it."

Watzman also predicted MSHA's application of its new definition of "normal production shift" will cause operating problems. Further, he questioned whether technical problems associated with the CPDM would be worked out by 2016 or even if a sufficient supply of the new devices would be available then.

In the first coalfields stakeholder meeting on the rule held by MSHA on May 8 in West Virginia, an operator also noted the high cost of the new monitor. He said his company would have to spend $750,000 for 40 to 50 units and asked if financial assistance would be available. He was told no assistance is built into the rule and that his per-unit estimate was $3,000-$5,000 too low.

UMWA's Roberts seem to share Watzman's general concern over how the rule is to be implemented feasibly. Roberts said, "We hope that, as the stakeholders move forward in understanding and implementing this rule, we can get more clarity from MSHA as to how it will actually be applied and enforced in an active working coal mine environment."

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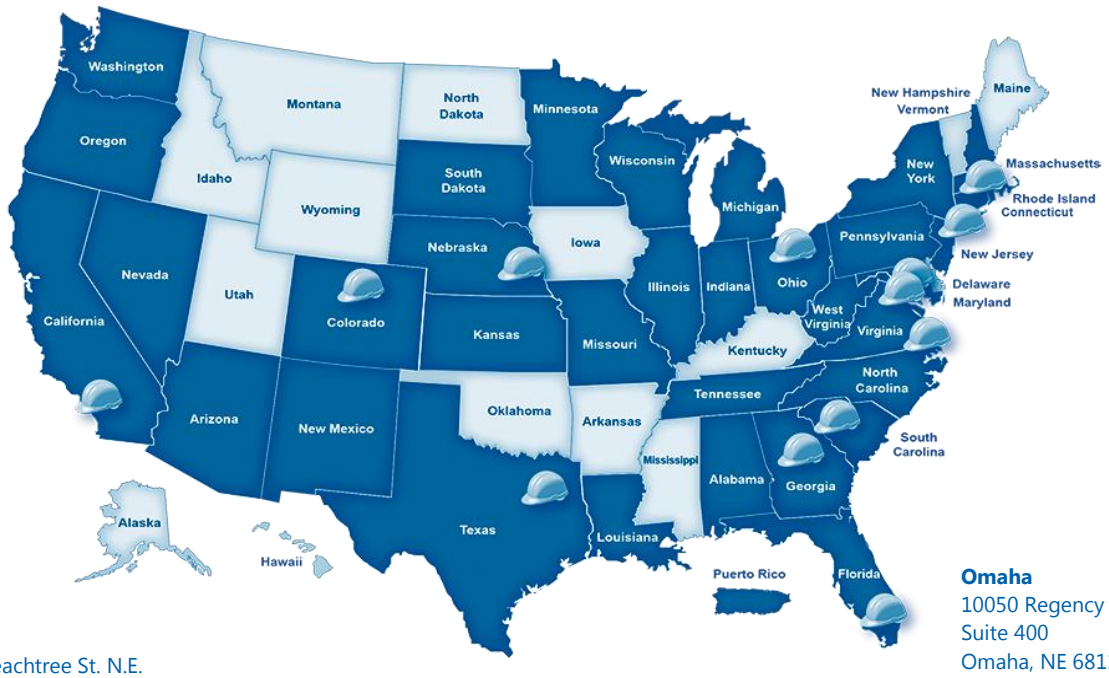

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