

Week of **August 11, 2014**

OSHA Updates Cell Tower Directive

OSHA has issued a directive outlining the proper use of hoist and other fall arrest systems. The directive, released on July 17, 2014, includes detailed information on how to hoist people safely. It covers any work on a communication tower that involves a hoist to lift workers from one elevated workstation to another, and updates a 2002 enforcement policy that had covered only hoisting workers when new towers are erected.

OSHA, on July 31, 2014, expressed concern for “the alarming increase in preventable injuries and fatalities at communication tower work sites.” Nine cell tower workers have been killed thus far this year, four fewer than the 13 workers who died last year. However, the 2013 figure is more than twice the number of such deaths over the previous two years combined.

Release of the directive is the latest in a series of actions taken by OSHA to improve cell tower safety. The agency is collaborating with the National Association of Tower

Erectors and other industry stakeholders to ensure every communication tower employer understands how to protect workers performing this high-hazard work.

In addition, OSHA has created a webpage targeting communication tower work safety issues. It also has sent a letter to communication tower employers urging compliance and strict adherence to safety standards and commonsense practices. The outreach was undertaken after OSHA issued a memo in November 2013 to agency compliance officers and regional administrators mandating increased attention, education and data collection on the industry.

The agency said it continues to investigate past incidents and will issue findings as the probes are completed. Communication towers are on the agency's regulatory agenda, and OSHA expects to issue a Request for Information (RFI) later this year. RFIs generally are a first step in the rulemaking process.

MSHA's Imminent Danger Authority is Unreviewable, Judge Says

MSHA may issue an imminent danger order either to a production operator, an independent contractor, or both, and its decision is unreviewable by the court.

Administrative Law Judge Thomas McCarthy drew that conclusion in a case involving Cloverlick Coal Co., LLC,

which had contested an imminent danger order a federal inspector had issued at its Mine No. 1 in Kentucky in February 2012. Someone had complained to MSHA that water and rocks from a steep embankment were falling into a large hole a contractor had dug at the base of the hill to build a foundation for a retaining wall and a support

structure. The imminent danger order was issued under Section 107(a) of the Mine Act.

Cloverlick argued MSHA had abused its discretion by directing the order against Cloverlick rather than against its contractor, Cumberland Mine Service, Inc. Cloverlick said it had done nothing wrong and contended the allegedly hazardous condition at the work site was solely within Cumberland's control. However, citing court precedent, McCarthy said it would be "anathema to the [Mine] Act's enforcement scheme" for Cloverlick to contract away its duties.

The operator also contended the order should be vacated because MSHA did not follow its own enforcement guidelines when it issued the order to Cloverlick and not to Cumberland. But the judge said courts "have universally held that the enforcement guidelines are merely a general statement of policy that do not curtail the Secretary's discretion."

The enforcement guidelines appear in MSHA's Program Policy Manual and have been published in the *Federal Register*. They outline general guidance about when a production operator, an independent contractor, or both

might be cited, and state that "inspectors should cite independent contractors for violations committed by the contractor." However, McCarthy said the guidelines "lack the certainty to bind the Secretary's discretion" in deciding who to cite.

The judge said MSHA was still obligated to explain why it deviated from established policy. Nonetheless, in his August 5 decision he stated that there was insufficient evidence in the case to determine the extent to which the agency had relied upon its guidelines.

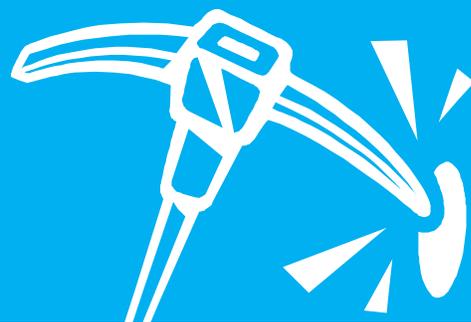
"Accordingly, under extant [Federal Mine Safety and Health Review] Commission and U.S. Circuit Court precedent I am constrained to find that the authority of the Secretary to issue an imminent danger order to a particular party is unreviewable," McCarthy said.

The agency cited both Cloverlick and Cumberland for allegedly failing to provide and maintain safe access to the working place. McCarthy threw out the citation against Cloverlick. He identified the "working place" as the hole, saying no evidence had been provided that access to it was unsafe. In a separate proceeding, Cumberland settled its citation after agreeing to a \$2,400 fine.

Jackson Lewis is co-sponsor of the upcoming 2-day seminar on

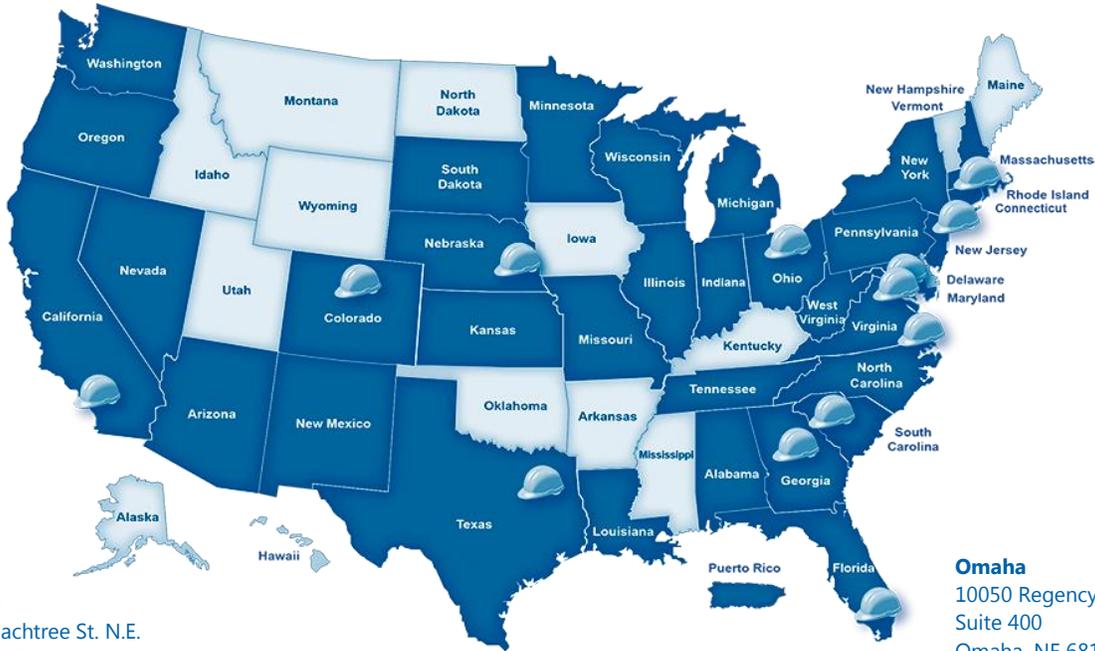
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