



*Wishing all of our Subscribers a
Happy, Healthy, and Safe New Year!*

Week of January 6, 2014

OSHA Citation Vacated for Lack of Scientific Support

Relying on witnesses who ignore scientific evidence is not recommended by the U.S. Court of Appeals for the Seventh Circuit.

In [*Caterpillar Logistics, Inc. v. Perez, et al.*](#), No. 13-1106 (7th Cir. Dec. 12, 2013), a panel of the Court reviewed an administrative law judge's twice-affirmed decision that an employee of Caterpillar Logistics, Inc., had suffered a work-related injury and soundly rejected it. The judge's decision was affirmed as a final order of the Occupational Safety and Health Review Commission.

"We are surprised that an ALJ would echo such a position and that the full Commission would decline to intervene," appeals court Judge Frank H. Easterbrook wrote in a decision vacating an OSHA recordkeeping citation. "Judges and other lawyers must learn how to deal with scientific evidence and inference."

The employee worked in a packing department, taking items from containers and putting them into shipping boxes. She suffered from inflamed tendons in her elbow, a condition known medically as epicondylitis. OSHA cited Caterpillar under 29 CFR 1904.4(a) for not recording her injury as work-related.

The employer objected, saying a five-person expert panel had concluded her injury could not be due to work because both force and repetitive motion are required to cause epicondylitis, but her job only involved repetitive motion. Three of the panelists were specialists in musculoskeletal injuries, and the panel claimed it had relied on guidance from NIOSH and the American Medical Association. The group also found the employee was the only person in the packing department to have ever suffered the injury.

The ALJ, though, gave greater weight to the government's witness, a clinical professor of medicine at the University of California. The professor testified that the employee's combination of moderate repetition plus pronation (turning) of her wrist, hand and forearm must have caused her injury. He did not explain why no other worker in her department had ever experienced the ailment.

The Court held the judge inappropriately relied upon a minority view held among musculoskeletal specialists and ignored epidemiological studies and Caterpillar's history. The judge's first decision was remanded to the Commission, which then returned it to the judge. The ALJ revised his opinion.

In its latest decision, the Court said the judge did not test the conclusions of the government's witness. Instead, the ALJ accepted the professor's belief that contrary evidence was not material and could be ignored. Rejecting that position, the Court said the government's expert should have looked at data "from thousands of workers in hundreds of workplaces," or at least have looked at data on "hundreds of workers in Caterpillar's own workplace."

The key question, the Court added, was whether the expert's "framework is sound, and short of new discoveries about human physiology, only statistical analysis will reveal the answer."

An individual close to the case remarked that the Court's decision sends a message: "You can see the court alerting all plaintiffs and the Department of Labor that they have to use that scientific evidence."

Criminal Charges Dropped against Mining Company, Foreman

Ruling the government could not prove its case, a federal district court judge has thrown out criminal charges against a Virginia coal operator and its foreman. *United States v. Hills Coal Co., Inc. and David Grigsby* (W.D. Va. Dec. 18, 2013).

The U.S. Attorney's Office brought charges against Hills Coal Co. and foreman David Grigsby after allegedly finding an unguarded return roller on a conveyor at the company's Tipple #1 coal processing facility in 2009. The company filed a notice intending to contest the enforcement action, but later settled and paid the fine.

However, MSHA decided to launch a criminal case. In a 13-count indictment, it accused the company and Grigsby of:

- failing to ensure guards were in place,
- failing to conduct adequate on-shift examinations, and

- falsely representing the mine was in compliance during the first half of April 2009.

The government had to prove Hills and its foreman acted with willful and/or knowing intent. Finding no evidence of that, on the defendants' motion for acquittal, U.S. District Court Judge James Jones threw out the case on the first day of trial. The defendants had presented evidence that MSHA had never before cited the condition during inspections over the previous seven years. Hills also abated the citation promptly, as well as other guarding violations MSHA wrote over the years.

If convicted, the company could have faced millions in fines and Grigsby, years in prison. Twelve of the 13 charges were felony counts, each carrying a maximum fine of \$500,000 and five years behind bars.



Be sure to subscribe to Jackson Lewis' OSHA Law Blog!
Visit www.oshalawblog.com to sign up!

