

Week of **June 16, 2014**

OSHA's Regulatory Agency Holds Surprise

OSHA's latest regulatory agenda is "aggressive," but it downplays an issue that until recently the agency had committed itself to regulate, according to Jackson Lewis attorney Tressi Cordaro.

In its regulatory agenda released last month, OSHA listed action planned on 29 different items. Yet one issue it previously ballyhooed as a rulemaking priority – its Injury and Illness Prevention Program initiative, popularly known as I2P2 – has been relegated to "long-term action," which some may regard as regulatory-speak for "whenever."

"They're trying to get a lot in, and to me it comes down to a lack of staffing to move forward on the rest of the agenda," Cordaro told BLR. "They've prioritized and moved I2P2 to the back burner for now."

Cordaro described OSHA's current agenda as "aggressive." It also may be unrealistic. She expressed doubt OSHA would be able to meet its deadlines for final rules, and, to make her point, called attention to a six-month delay in releasing a recent final rule on electric power generation and transmission.

OSHA has plans to issue three final rules between now and October. They involve changes to reporting and recordkeeping rules, confined space in construction and walking/working surfaces in general industry. Cordaro, who is experienced in handling OSHA issues, believes that by moving these three ahead of I2P2, OSHA decided to see existing rulemakings through to completion before starting new rulemaking on injury prevention.

OSHA also said it would publish a direct final rule by September updating references in its eye and face

protection rule to incorporate the 2010 edition of the ANSI Eye and Face Protection consensus standard (ANSI Z-87.1). By next March, the agency wants to issue a final rule requiring affected employers to submit certain information electronically from the OSHA 300 Log, OSHA 301 Incident Report and OSHA 300A summary. Currently, employers are required to provide this information to OSHA only upon request.

July is OSHA's target date for release of a proposal on beryllium and a second proposed rule to make corrections and amendments to its standard for cranes and derricks in construction. The agenda set no date for release of a controversial proposed rule on crystalline silica.

OSHA's immediate regulatory horizon also includes a request for information on a possible new regulation for communication tower safety, set for release this month. A recent spate of fatalities has beset the communications tower industry, and OSHA has been encouraging employers to use best practices to curb it. Requesting information for a possible standard should put affected employers on notice, Cordaro said. She urged the industry to participate in the rulemaking and provide information to OSHA "so that a rule is developed based on accurate facts."

Listed in the "prerule stage" are regulatory actions on combustible dust, bloodborne pathogens, infectious diseases, preventing backover injuries and fatalities, chemical management and permissible exposure limits, process safety management and prevention of major chemical accidents, and emergency response and preparedness.

Citing Lack of Justification, Judge Cuts Big MSHA Fine

An administrative law judge cut an MSHA fine by nearly 30 percent after supporting an inspector's enforcement actions, but rejecting MSHA's proposed maximum fine because the agency did not explain why the penalty was so high.

MSHA took enforcement action after a massive highwall failure occurred in October 2011 at Tuscaloosa Resources' Highway 59 No. 1 surface coal mine in Alabama. The dislodged material pushed a haul truck over a bench, severely injuring the driver.

The agency issued a citation for the alleged failure to follow the ground control plan and an order for allegedly failing to conduct adequate on-shift examinations. The violations were categorized as aggravated conduct beyond ordinary negligence and likely to lead to serious injury. MSHA applied its special assessment procedures to increase the per violation fine to the \$70,000 maximum allowed.

The highwall failure followed a similar failure in the same general area the previous January. In that incident, dislodged material flowed over the bench and moved a backhoe on the bench below 75 feet. In addition, the toe of the highwall had given way several times between the two incidents, resulting in material nearly overtopping a berm the operator had built as a barricade near the base of the highwall and causing

employees to be evacuated temporarily. Evidence at the hearing revealed another significant slide had occurred between the two reported slides as well.

Judge Simonton upheld both violations as written. He supported the citation because he found the operator had failed to take appropriate corrective action after the initial slide. He criticized the berm as "an inherently inadequate control method" and the operator's belief it was sufficient as "not objectively reasonable."

Likewise, he approved the order, pointing to photo evidence after the October slide showing unsafe conditions existed on the highwall. Finding these hazards to be "obvious," Simonton said, "By failing to record the seepage, Respondent failed to maintain an inspection system that allowed its employees to gauge and track the severity of ongoing seepage and erosion." He also noted the October slide had occurred in the same general area as the January slide despite the company's assurance after the first incident that it would mine elsewhere.

However, in a decision issued June 10, Simonton reduced MSHA's proposed \$140,000 penalty to \$100,000 after stating MSHA had not provided substantive guidance to support the higher amount. The mine suspended production in November 2011 and is on temporary idle status.



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