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Workplace Safety and Health Update

Week of ***February 24, 2014***

Administrative Law Judge Vacates Citation for Loader that Has Not Had Pre-Operational Inspection

A judge's February 18 decision vacating a citation for a safety defect on a piece of mobile equipment has further clouded enforcement of the Mine Safety and Health Administration's safety defects standard (30 C.F.R. § 56.14100).

Administrative Law Judge Priscilla Rae vacated the citation and accompanying $224 fine against Martin Marietta Materials after an inspector issued a ticket under 30 C.F.R. § 56.14100(b), which requires timely correction of defects, when he found defective headlights on a skid steer loader parked in an equipment shop at the company's Greenwood Quarry in Missouri.

In similar cases, MSHA has argued that defects affecting safety are *per se* violations under the strict liability mandate of the Mine Safety and Health Act. Therefore, unless a defect has been identified and either tagged out or parked in a designated area for repair, MSHA has held that enforcement action is appropriate. However, in this case, the agency seems to have hesitated. It qualified its argument by saying the operator should have known about the faulty switch or taken the equipment out of service "at least after a pre-shift examination."

MSHA argued in the alternative that if the ticket could not be sustained under the 30 C.F.R. § 56.14100(b) standard, then upholding it under 30 C.F.R. § 56.14100(c) would be appropriate. That section requires removal of the equipment from service when the defect creates a hazard from its continued operation. It provides, "When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected."

ALJ Rae dismissed the agency's arguments. She said MSHA presented no evidence the operator knew or should have known the defect existed. The headlights had been working the day before, but, on the day of the inspection, the loader had not been put into service, nor had a pre-operational examination been conducted. Likewise, no evidence was offered that the operator would not have conducted the mandated examination and repaired the problem before allowing the loader to be operated.

Judges have come down on both sides of the question on the extent to which strict liability should be imposed in cases involving the 30 C.F.R. § 56.14100 standard. A definitive decision could be coming from the Federal Mine Safety and Health Review Commission. In *Wake Stone Corp.*, a case argued for the operator by Jackson Lewis attorneys, an inspector refused to acknowledge the operator's lawful duty to correct defects free of enforcement action following a pre-operational inspection of mobile equipment, which was found to have inoperable service horns. A decision is expected soon.

OSHA Focuses on Hospitals

OSHA states on its webpage that "a hospital is one of the most hazardous places to work." In 2011, U.S. hospitals recorded 58,860 work-related injuries and illnesses that caused employees to miss work. OSHA suggests that in terms of lost-time case rates, it is more hazardous to work in a hospital than in construction or manufacturing.

Hospital settings often present serious hazards to employees, including those involving lifting, transferring, and repositioning patients, workplace violence, needlesticks, building maintenance and others. Hospital work takes place in an unpredictable environment with a unique culture. Caregivers seek to "do no harm" to patients and some will even put their own safety and health at risk to help a patient.

OSHA reports that most hospital injuries result from a few well-known hazards. Nearly half (48 percent) of injuries resulting in days away from work are caused by overexertion or bodily reaction, including motions such as lifting, bending, or reaching, often relate to patient handling. The resulting injuries often are musculoskeletal in nature.

Workplace safety also affects patient care. Manual lifting can injure caregivers and put patients at risk of falls, fractures, bruises, and skin tears. Caregiver fatigue, injury, and stress are tied to a higher risk of medication errors and patient infections.

OSHA has created a suite of resources to help hospitals understand workplace safety needs, implement safety and health management systems, and enhance their safe patient handling programs. *See* "Facts about Hospital Worker Safety" at www.osha.gov/dsg/hospitals.

When an employee gets hurt on the job, hospitals pay in many ways, including:

- Workers' compensation must cover lost wages and medical costs. The average hospital experiences $0.78 in workers' compensation losses for every $100 of payroll. Nationwide, that is a total annual expense of $2 billion.
- Temporary staffing, backfilling, and overtime may be needed when injured employees miss work.
- Turnover costs are incurred when an injured employee quits. It costs money to recruit, hire, and train a replacement.
- Productivity and morale decrease as employees become physically and emotionally fatigued; patient care may be affected.

OSHA's tools (available on its website) can help hospital management reduce injury risks:

- *Worker Safety in Your Hospital: Know the Facts.* This four-page booklet provides a concise summary of injury and illness rates, the major causes of injuries, costs, and solutions. It is a high-level overview sprinkled with examples to inspire hospital administrators and staff to take action.
- *Facts About Hospital Worker Safety.* This compendium presents data from the Bureau of Labor Statistics, workers' compensation insurers, and detailed studies. For safety managers and others who want to explore the issue in depth, this booklet offers a comprehensive look at how hospital workers get hurt, which occupations are most at risk, how much these injuries cost (including "hidden" costs), and how thorough recordkeeping can help you identify problems and solutions.
- *How Safe is Your Hospital for Workers? A Self-Assessment.* This three-page fillable questionnaire encourages data-driven self-evaluation. It offers an opportunity for top administrators to talk with

safety managers to find out how your injury rates compare with hospitals nationwide—and how these injuries affect your bottom line.

- *Integrating Patient and Workplace Safety Programs: Lessons from High-Performing Hospitals.* This summary for hospital administrators uses real-world examples to demonstrate the value of a systematic process for proactively addressing workplace safety.
- *Safety and Health Management Systems and Joint Commission Standards: A Comparison.* This table shows how core elements of a safety and health management system relate to Joint Commission hospital accreditation standards. You will see that safety and health can easily be integrated into existing Joint Commission compliance plans.
- *Hospital Safety and Health Management System Self-Assessment Questionnaire.* A detailed tool that helps safety managers determine how many recommended elements of a safety and health management system are in place at their hospitals and identifies opportunities for improvement.
- *Safety and Health Management Systems: A Road Map for Hospitals.* This guidebook describes the six main elements of a safety and health management system and provides strategies for implementing them.. It features "success stories" and best practices from a variety of hospitals.
- *Safe Patient Handling Programs: Effectiveness and Cost Savings.* An overview for administrators, this safety tool lays out the financial benefits of implementing and sustaining a safe patient handling program.
- *Safe Patient Handling: A Self-Assessment.* This two-page questionnaire can help administrators and safety managers review their patient handling injury rates, examine existing policies and programs, and identify areas of concern and opportunities for improvement.
- *Safe Patient Handling: Busting the Myths.* Common myths, barriers, and misconceptions about safe patient handling, and the facts to disprove them, are explained.
- *Safe Patient Handling Program Checklist.* This customizable document includes a helpful list of factors to consider when starting or evaluating an existing safe patient handling program, based on lessons learned and best practices from various hospitals.
- *Safe Patient Handling Programs: Learn from the Leaders.* Brief profiles describe how five hospitals have implemented safe patient handling programs and successfully reduced worker injuries, reduced costs, and improved patient care.
- *Need a Lift? Just Ask!* This poster was designed to engage patients and their families and educate them about safe patient handling policies and equipment. Your hospital can customize this poster and post it in patient rooms.

Jackson Lewis Shareholder Avi Meyerstein advises hospitals on OSHA risk reduction and recommends that hospital management personnel familiarize themselves with OSHA's hospital resources and mandates and conduct management training for compliance and inspection preparedness. For questions, contact Avi at avi.meyerstein@jacksonlewis.com.

Ask a Jackson Lewis Attorney

Q:

One of our employees came to work behaving erratically, grabbed a plastic fork in the kitchen, and threatened another coworker with it. When we met with the employee to impose discipline, she told us she recently was diagnosed with bipolar disorder, and said her illness had caused her behavior. She said that her doctor was trying new medications and that she should be stabilized in 2-4 weeks. Can we still give her a written warning, as we planned? What should we do next?

Answer provided by Teresa Burke Wright, a shareholder in the Washington, D.C. Region office:

The employee's explanation – that her bipolar disorder may have caused her unacceptable conduct – is a request for "reasonable accommodation" under the Americans with Disabilities Act (ADA). In January, 2009, the ADA was amended to greatly broaden the number of employees who are protected by that law, and bipolar disorder almost certainly will qualify. The company can still provide the written warning, because it related to conduct that occurred before she had requested accommodation. In addition, the company does not have to tolerate similar conduct in the future – but it also must engage in an "interactive process" with this employee to evaluate and provide accommodations as needed, to assist the employee to work productively and avoid this type of conduct.

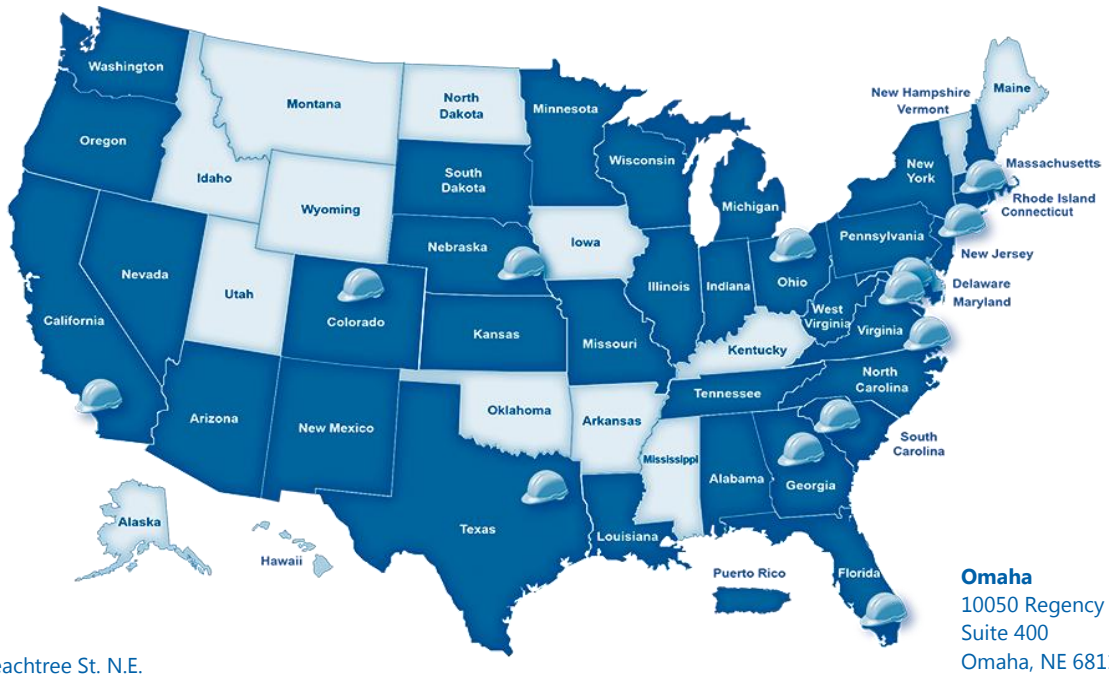
First, the employer should request medical information from the employee's physician describing the disability at issue and the accommodations that might assist her. All communications with the physician's office should be in writing and should be provided via the employee to ensure that the doctor is authorized to provide the information to the employer. Once the relevant information is obtained, the employer should work with the employee (and possibly the physician) to implement accommodations designed to assist the employee. In this situation, possible accommodations might include more frequent breaks, a change in work schedule; part-time work; a short- or long-term telecommuting arrangement, or a transfer to a less stressful job. No accommodation is required that would impose an undue hardship on the employer, and not every accommodation listed will work in every situation. For one employee, an employer might be able to allow her to work from home; for another employee in a different job, working from home might not be an option, but a change to part-time work might be acceptable. Accommodation is an ongoing process, so if one accommodation does not work, the employer would be obligated to evaluate and implement other accommodations if available. If the employee is not able to adhere to workplace conduct requirements for the next 2-4 weeks while her medication is adjusted, then a short-term leave of absence might be appropriate for that time period, with other accommodations to be provided upon her return to work.

Once accommodations are in place, the employer has the right to expect that the employee will conform her conduct to the company's standards and will avoid threatening her coworkers. If the employee is not able to adhere to conduct standards despite accommodations, termination may result.

Do you have a workplace safety and health question that may be of interest to other employers? Please send your questions to Regan Harrison at Regan.Harrison@jacksonlewis.com.

With experienced OSHA and MSHA attorneys located strategically throughout the nation,

Jackson Lewis is uniquely positioned to serve all of an employer's workplace safety and health needs:



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