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Workplace Safety and Health Update

Week of ***May 18, 2015***

Fuel Delivery Drivers Found Exempt from Comprehensive Miner Training

A driver for a fuel delivery service that regularly provides fuel to a Minnesota quarry is not a miner subject to comprehensive miner training, an administrative law judge (ALJ) has ruled.

ALJ L. Zane Gill vacated a citation and failure-to-abate order against Midwest Fuels, Inc. A Mine Safety and Health Administration inspector had cited Midwest in September 2012 for failing to produce certification that its driver had received comprehensive training under MSHA's Part 46 training rule. The agency proposed a $112 fine. Midwest filed a notice of contest. Two weeks after writing the citation, the agency issued a non-assessable 104(b) order because Midwest had taken no steps to correct the alleged infraction.

Midwest's driver had completed site-specific hazard awareness training at the quarry, and the company contended this training was all that was legally required for delivery workers or vendors under Part 46. MSHA contended the driver was a "miner" because he fueled equipment at an active mine site in the same general vicinity as miners. Therefore, he was exposed to mining hazards, MSHA argued.

MSHA's argument that the driver was a "miner" failed for several reasons, according to ALJ Gill. Under the regulation, to be classified as a miner, an individual must be engaged in mining operations. The agency conceded Midwest's driver did not perform mining work. In addition, Gill in essence said that the driver's alleged exposure to mining hazards was not relevant because such exposure is not included in the definition of "miner." Moreover, Gill pointed out that the language of Part 46 specifically excludes delivery workers, and, in support, cited MSHA's own exclusionary language in the preamble to the Part 46 rule.

"As a fuel delivery truck driver, [driver's name] was not a 'miner' under Part 46 of the regulations," Gill concluded.

The agency also argued the driver should be considered either a maintenance or service worker because he was at the mine frequently to refuel machinery, an activity which enables the mine to meet its operational needs by maintaining machinery in functioning order. The agency asserted this argument was reasonable and thus was entitled to deference. The regulation mandates comprehensive training for maintenance or service workers who work at a mine for frequent or extended periods.

Gill rejected this line of reasoning as well. He referenced language for what MSHA believes represents maintenance and repair work in the agency's own publications to discount that delivering fuel was a maintenance or service activity. In a footnote, Gill said the 30-45 minute duration of the driver's daily visits to the quarry "was a very short period of time" that did not meet the frequent or extended periods language that will trigger comprehensive training.

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Process Safety Violations Not Time-Barred, Commission Rules

In a decision that drew dissent from one commissioner, the Occupational Safety and Health Review Commission has ruled that process safety violations are continual and thus are not subject to the same statute of limitations period as record-keeping infractions.

Delek Refining, Ltd. had sought to vacate two process safety citations the Occupational Safety and Health Administration wrote following OSHA's inspection of a Delek oil refinery in Tyler, Texas, which the company had recently acquired. The agency had cited Delek for a violation of 29 C.F.R. 1910.119(e)(5), which requires the employer to assemble a team of experts to conduct a process hazard analysis, and 29 C.F.R. 1910.119(o)(4), which requires the employer to certify at least every three years that it has evaluated its compliance with the process safety management standard.

Regarding the first alleged violation, OSHA alleged the employer had not addressed findings and recommendations from several process hazard analyses undertaken by the prior owner. As for the second, the government contended Delek had failed to respond to the prior owner's process safety management audit.

The company countered that the citations were time-barred because they were based on inadequate record-keeping that had preceded the OSHA citations by several years. In support, Delek cited a 2012 appeals court decision throwing out a record-keeping citation on timeliness grounds.

The Commission disagreed. It noted that the D.C. Circuit's *AKM* decision, which Delek had cited, addressed keeping records of injuries under Part 1904. The *AKM* court held that the failure to record is a distinct event, not a continuing violation, and that the statute of limitations period begins to run when the employer fails to record the injury. However, according to the Commission majority, the *AKM* court drew a distinction between an occurrence that triggers a statute of limitations and one in which the employer continues to expose employees to unsafe situations. The latter example is a continuing violation, and such violations were the ones that occurred in the Delek case, the majority said.

The commissioners also dismissed Delek's argument that, because the prior owner had conducted the analyses, it was the prior owner's responsibility to address them. Such a conclusion, the commission majority held, would "lead to the absurd result" of allowing deficiencies detected by a previous owner to go unaddressed until the current owner was required by the process safety standard to conduct its own analyses. The majority also noted that OSHA's process safety management (PSM) standard sets a schedule for auditing and abating potential process hazards and PSM compliance issues.

"[T]here is nothing in the standard to suggest that this schedule is reset or altered by the sale of the facility in which the process takes place," the majority wrote.

In her dissent to these interpretations, Commissioner Heather L. MacDougall argued that the majority's reading of *AKM* as applying only to record-keeping violations was too narrow. She added that she believed the plain language of the standard did not extend liability to a subsequent employer such as Delek.

"I am concerned that the majority's holding here has increased the compliance burdens and costs for employers—particularly those acquiring new facilities," she concluded.

In addition to the process safety infractions, OSHA had cited Delek for four other alleged violations during the same inspection. The commissioners affirmed citations for failing to adequately inspect and test a positive pressurization unit for the refinery's fluid catalytic cracking unit and for inadequate labeling of hazardous chemical containers.

However, they vacated a citation for Delek's alleged failure to document a change in procedure when the company used a piece of equipment that was actually part of its regular arsenal of tools. The tribunal also threw out a citation for allegedly failing to guard a rotating shaft after Delek successfully argued OSHA had not demonstrated workers were exposed to a danger. Delek's total penalty thus came to $21,150, down from $30,600.

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