

Week of **July 20, 2015**

OSHA Delays Full Enforcement of Confined Spaces in Construction Standard

Except for training, the construction industry will have a two-month respite from full enforcement of the new confined spaces in construction standard, provided employers can demonstrate to the satisfaction of the Occupational Safety and Health Administration that they are making good faith efforts to comply with the new rule.

The standard goes into effective August 3, 2015, but, in a press release this month, OSHA announced it was postponing full enforcement of the new standard until October 2, 2015, after employers requested additional time to train and to acquire equipment necessary to comply. The policy memorandum can be found at https://www.osha.gov/confinedspaces/tempenforcementpolicy_0715.html.

During the 60-day temporary enforcement period, the agency said no citations would be issued to employers who take steps to comply. These compliance efforts include:

- Scheduling training for employees as required by the new standard;
- Ordering or otherwise arranging to obtain the necessary equipment, including personal protective equipment, and taking alternative measures to educate and protect employees from confined space hazards; and
- Making any additional efforts to educate workers about confined space hazards and to protect them from those hazards.

However, there is one exception to this temporary policy. OSHA said employers must be in compliance with either the training requirements of the new standard (at 29 CFR § 1926.1207) or those of the former standard (at 29 CFR § 1926.21(b)(6)(i)). The latter provision mandates that employees required to enter confined spaces receive instruction on the nature of the hazards involved, necessary precautions, and the use of required protective and emergency equipment.

“Employers who fail to train their employees consistent with either of these two standards will be cited” under the new standard, § 1926.1207(a), the agency said.

The final rule, issued in May, provides construction workers with confined space protections similar to workers in manufacturing and general industry, yet tailored to the construction industry. These include requirements to ensure that multiple employers share vital safety information and to continuously monitor hazards using technological resources not available when the manufacturing and general industry standards were released.

According to OSHA, the new rule could protect nearly 800 construction workers a year from serious injuries and reduce life-threatening hazards.

Interests representing the homebuilding sector have filed suit in the federal appeals court in New Orleans alleging the rule is arbitrary and capricious, not supported by the record, and an abuse of discretion.

Judge Steers Independent Course in Quarry Litigation

A Federal Mine Safety and Health Commission Administrative Law Judge has upheld seven of eight citations against an Illinois quarry operator while raising the negligence rating of four of them.

An authorized representative of the Mine Safety and Health Administration wrote 10 citations at Northern Illinois Service Co.'s Portable #1 and #2 Mines during inspection visits in April and July of 2012. MSHA vacated two of them, leaving eight for litigation.

Four of the tickets were for alleged violations of the agency's standard at 30 CFR § 56.4501, which requires fuel lines on nonself-propelled equipment to be equipped with valves to stop the flow of fuel at the source. Challenging one such citation for not having a fuel shutoff valve between the engine and tanks of a secondary crusher, Northern Illinois contended the standard diminished safety because installing a valve would double the number of places a leak was likely to develop. Additionally, in the event of a fire, miners trying to shut off the value would be imperiled, it argued, because they would be encouraged to enter what the company called "a danger zone." The operator made similar assertions for the other three violations of that standard.

In a decision dated July 7 (http://www.fmshrc.gov/decisions/alj/ALJd_7072015-LAKE%202012%200746%20M%20et%20al_Decision%20and%20Order.pdf), Administrative Law Judge L. Zane Gill stated that the operator's arguments were "not a valid defense." He said if the company felt the standard diminished safety, it should have sought a modification from the agency; however, nothing in the record suggested the operator had made such an appeal.

While siding with MSHA, in two instances, ALJ Gill nonetheless raised the negligence classification

recommended by the inspector to high, from either low or moderate. He disagreed with the inspector's justification that, because MSHA had never cited the operator for the infractions previously, Northern Illinois had not received fair notice of MSHA's enforcement intent.

"[T]his [fair notice] consideration would make high negligence inapplicable to most citations, since they often have not been previously cited," said Gill. The statement reflects his view that enforcement by MSHA inspectors is frequently inconsistent.

The judge also elevated the negligence classification on a citation for failing to conduct a continuity and resistance test after determining the company had contested a similar citation at another of its mines in 2011. Further, he raised the negligence level to high, from moderate, for the operator's failure to set the parking brake on a pickup truck, because he said the operator was well aware of the requirement. He added that there were no mitigating circumstances, even though the vehicle was found in Park gear, on a level surface with chocked wheels and a disconnected battery. Moreover, the truck was parked in an area of the mine shop where there was very little mobile equipment movement and little foot traffic.

Gill affirmed a seventh citation for lack of a chain to secure a ladder opening on the deck of a crusher. But he dismissed a citation for non-functional brake lights on a front-end loader after determining that mine personnel had repaired the lights in a timely manner, as required by 56.14100(b), and noting that the inspector could not estimate how long the lights had been inoperable. For each of the seven upheld citations, he agreed with MSHA's proposed assessments, which came to a total of \$736.

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