



**INSIGHTS** is our environmental, health and safety, and crisis management newsletter, made for our clients and friends.

# INSIGHTS

Resource for Safety, Health, and Environmental Law & Crisis Management

MARCH 2008

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## 1. SUPREME COURT DECLINES OSHA EMPLOYEE MISCONDUCT CASE

The United States Supreme Court declined to hear *John Carlo, Inc. v. Secretary of Labor*. The case involves the “employee misconduct” defense to an OSHA violation where supervisor misconduct is at issue. The Supreme Court action leaves the matter in different postures around the country for employers who are defending alleged OSHA violations.

The case arose from a construction trench cave-in fatality. It was undisputed that OSHA violations occurred which resulted in an employee’s death. The employer argued that the violations were the result of misconduct by its supervisors, which was not foreseeable and therefore could not be imputed to the employer to prove knowledge by the employer.

OSHA prevailed before the Administrative Law Judge, the Occupational Safety and Health Review Commission, and the U.S. Court of Appeals for the Eleventh Circuit. In its petition, the employer argued “that by imputing the supervisors’ knowledge of their own misconduct to [the employer], the Commission relieved the Secretary of Labor of the burden of proving a core element of the prima facie case – that the supervisors’ misconduct was foreseeable to [the employer]. . . This case provided the Court an opportunity to resolve a conflict [amongst the Circuit Courts] concerning the important question of whether knowledge-imputation should be permitted in supervisory misconduct cases.”

The Secretary of Labor argued that it was not “unreasonable for the ALJ to hold [the employer] responsible for the knowing and deliberate violation of safety standards that was personally ordered by [the job superintendent] . . . and personally overseen by [the foreman], the person who ‘directed the work’ at the worksite and who ‘was the highest ranking supervisor at the trench at the time of the accident.’”

The Supreme Court declined to settle a split in circuit court authority on this issue. The Third, Fourth, Fifth and Tenth Circuits currently prohibit automatic knowledge imputation in OSHA cases which involve supervisory misconduct. In these circuits, the argument remains viable.

Although the Mine Act is a strict liability statute, which eliminates a defense based on unpredictable employee misconduct, a similar argument could be made in an MSHA case involving unforeseeable supervisor misconduct to address the degree of negligence alleged by MSHA. MSHA retains the burden of proving the alleged degree of operator negligence to support increased penalties, unwarrantable failure actions, and other enhanced enforcement actions.

Importantly, to lay the groundwork for a defense based on unforeseeable employee misconduct, employers under OSHA and mine operators under MSHA must develop and implement health and safety rules and use announced and even-handed disciplinary systems to enforce them. Patton Boggs can provide further guidance to lay the groundwork for a successful appeal. Contact Henry Chajet (202-457-6511, [hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com)) or Mark Savit (303-894-6117, [msavit@pattonboggs.com](mailto:msavit@pattonboggs.com)).

## 2. NEW OSHA NATIONAL EMPHASIS PLAN ON SILICA

In what is likely an attempt to support future rulemaking, OSHA last month launched yet another silica initiative. This one is a National Emphasis Program (NEP) on crystalline silica.

OSHA chief Edwin G. Foulke, Jr. announced the initiative in a press release, saying the goal was to maximize employee protection against silica-related hazards and eliminate workplace exposures. "Exposure to silica threatens nearly two million American employees annually," he said.

In the mid-1990s OSHA rolled out what it then called a Special Emphasis Program (SEP) on the silica. The agency made no secret of its view that silica-related diseases were entirely preventable.

Soon thereafter, silica was on the agency's regulatory agenda. In 2003, OSHA floated a draft silica regulatory proposal to a small business panel in the construction industry. The proposal called for a comprehensive approach of medical exams, exposure monitoring, installation of controls, recordkeeping, and training. It was sharply criticized, in large part because of a study of its cost commissioned by Patton Boggs. That study put the price tag for compliance at over \$1 billion.

The view widely held in industry is that a proposed rule will be forthcoming if Democrats solidify their majority in the fall elections. At present, a silica health effects and risk assessment document is working its way through peer review. The assessment would be required should a new rule be proposed.

The purpose of the NEP seems more likely to have been designed to collect information to support a rule than to emphasize compliance with the existing rules. That message does not come through in the agency's explanation for why it was issued. OSHA said the purpose was to update the SEP and clarify procedures. It applies to general industry and construction.

## 3. FY '09 PROPOSED ENFORCEMENT BUDGETS AT MSHA AND OSHA INCREASE, NIOSH BUDGET DROPS

President Bush's proposed budget for FY 2009 includes about a 6% increase in the enforcement budget at OSHA, and money for 55 new inspectors in MSHA's metal/non-metal (M/NM) sector. NIOSH would see a \$1 million drop in its mining research budget.

Under the President's plan, OSHA's budget would rise to \$501.7 million, up from his \$490.3 million proposal for the current fiscal year, and includes more than \$11 million more for enforcement. Full-time equivalent staff would increase to 2,165 from 2,118. Congress approved \$486 million for the agency this year.

At MSHA, the budget would also go up by 6%, and include \$7.4 million for the new inspectors. MSHA requested the inspector money so it could complete all of its mandated inspections in the M/NM sector this fiscal year. In addition, \$6 million is being sought for the Solicitor's Office, which is being inundated with litigation due to a new regulation upping fines for civil penalties.

The budget for MSHA came under fire because it led some in the media to claim it represented a reduction from the current year. The President proposed \$332.1 million for MSHA, down from the \$334 million the agency received this year. However, the current budget represents a one-time supplemental funding boost of \$20 million that went for beefed up inspections in coal, infrastructure improvements at the Mine Academy, new equipment, support to the regulations-development office, and outside contracts.

President Bush proposed \$37 million for mining research at NIOSH, a drop of \$1 million from what the institute received this year. NIOSH received \$382 million for all its work this year. That figure would drop to \$271 million under the President's FY 09 plan. The drop reflects substantial cuts in the NIOSH National Occupational Research Agenda and World Trade Center programs.

Several Democrats declared the President's latest budget request "dead on arrival." In the wake of Crandall Canyon, the majority in Congress is also likely to seek more enforcement money for MSHA. NIOSH, well regarded on the Hill, also may receive more funding.

However, none of the agencies are likely to see additional money soon. If the past is prologue, Congress will not approve a budget before the end of the fiscal year. That is even more likely in this election year. Instead, look for the government to operate on a series of continuing resolutions.

#### **4. OSHA REFORM – MORE ENFORCEMENT, LESS ENCOURAGEMENT OF VOLUNTARY COMPLIANCE?**

The Democratic Congress is ratcheting up the heat on OSHA to place greater emphasis on enforcement and less on voluntary compliance as a means to curb workplace injuries and illnesses.

Several relatively recent high-profile incidents have spurred lawmakers. National attention was drawn to microwave popcorn manufacturing plants in the Midwest and California when it was learned that diacetyl, a butter-like flavoring used in popcorn and other foods, was linked to a serious lung disease. More recently, last month a dust explosion at a Georgia sugar plant that killed 12 workers drew attention to the danger of combustible dust and what OSHA was doing about it (see article below).

In January, the House Subcommittee on Workforce Protections held a field hearing in New Jersey to look into the deaths in December of two Hispanic workers overcome by toxic fumes while cleaning a tank at a commercial laundry.

In opening remarks, Chairwoman Lynn Woolsey (D-CA) accused the Bush Administration of failing to protect workers. "Instead, OSHA has bowed to the request of employers and has relied on companies' voluntary compliance, when it should have been enforcing the law and issuing new, protective standards to address new and old hazards."

Woolsey has introduced an OSHA reform measure that would expand OSHA coverage to include public employees, increase protections for whistleblowers, and increase penalties for certain violators, among other provisions. Among its requirements, H.R. 2049, Protecting America's Workers Act, would require employees to inform OSHA when a worker is killed on the job or two or more persons are hospitalized. OSHA would then be required to launch an investigation.

It would add a "victim's rights" provision requiring OSHA to allow injured employees or their families to testify during negotiations called to settle citations issued for deaths or serious injuries. In addition, proposed citations may be appealed to OSHA and to the Occupational Safety and Health Review Commission by the victim or victim's family.

Maximum penalties for willful or repeat violations would rise to \$100,000 from \$70,000, and to between \$50,000 and \$250,000 for each violation leading to death. Each serious or non-serious violation leading to death would range from \$20,000 to \$50,000. Those same penalties would apply for failure to abate a citation that leads to

death. There would be significant increases in fines and prison sentences for criminal violations. Companion legislation, S. 1244, has been introduced in the Senate.

At the New Jersey hearing, a labor leader proposed Woolsey's bill be amended to require employers to create joint labor/management committees that would have "the right to survey the workplace on a regular basis and to investigate accidents, near-accidents, and exposures."

## **5. MINE RESCUE RULES FINALIZED**

In February, MSHA finalized a rule on mine rescue teams in underground coal mines. The new mandate bumps up the annual mine rescue refresher training requirement to 96 hours from 40 hours currently. A minimum of eight hours' training must be provided every two months. Participation in mine rescue contests would be counted, and familiarity training at each covered mine must be provided.

The final rule also requires two rescue teams be available within an hour's ground travel time of each of the nation's 653 underground coal mines. MSHA estimated this requirement would increase the number of rescue stations to 120 from 92 and create 68 new rescue teams. The travel time mandate was a stipulation in the MINER Act.

According to MSHA, which is notorious for underestimating costs, a \$2.7 million training cost was the biggest expense to operators of the estimated \$4.7 million annual price tag of the regulation. The total amount is an increase of \$3.1 million over the proposed rule. The average cost per mine was put at \$7,400.

The rule identifies four types of rescue teams – mine-site, composite, contract, and state-sponsored – with some differences in training and member qualification requirements. The mine operator must certify annually that the rescue team meets all legal requirements. Changes in team membership must be reported to the District Manager within 60 days.

Another new certification requirement, under 30 CFR 75.1501(a), is aimed at assuring the responsible person for mine emergency response receives annual training in an MSHA-prescribed course of instruction.

Operators have until February 2009 to meet the new training requirements. However, a staggered deadline schedule has been established before then for other requirements. The first deadline, May 8, is for a statement from the mine operator to the District Manager describing the mine's method of providing mine rescue coverage.

## **6. ASBESTOS RULES ISSUED BY MSHA**

MSHA promulgated an asbestos rule last month that lowers the 8-hour permissible exposure limit (PEL) to 0.1 fibers per cubic centimeter (f/cc), and the 30-minute peak exposure limit to 1 f/cc. The limits are identical to those enforced by OSHA. Analysis for compliance purposes must be by phase contrast microscopy (PCM). It goes into effect April 29.

The standard is directed at the six commercial varieties of asbestos, and not at the more than 100 other minerals that have been shown to exhibit asbestos-like characteristics. In addition, the rule adopts the federal definition of a fiber; i.e., longer than 5 micrometers and having at least a 3:1 length-to-width (aspect) ratio.

The definition means that rock particles, called cleavage fragments, which are not asbestos structures, could be mistaken microscopically for fibers that have been linked to asbestos-like disease. In such cases, MSHA said it would analyze these so-called "federal fibers" by a more powerful microscopic technique called TEM, which is capable of differentiating asbestos from non-asbestos materials.

MSHA said its sampling has turned up asbestos in two taconite mines in Minnesota, a sand and gravel mine in California, an olivine quarry in North Carolina, and a wollastonite operation in New York. The owner of the Minnesota operations disputed the findings. The company said the materials are cleavage fragments, which, it asserts, have not been shown to cause asbestos-like disease.

MSHA's asbestos rulemaking was initiated after a government report recommended a revised exposure limit in mining following news reports years ago of a rash of asbestos-related disease associated with a vermiculite mine in Libby, Montana.

## **7. MSHA TO ISSUE MORE NEW RULES**

MSHA's rulemaking calendar for the year is so clogged the agency has obtained two rule writers on temporary loan from OSHA. On MSHA's regulatory agenda this year is a final rule on seals and proposed regulations on refuge alternatives and belt air, all affecting underground coal. All mining will be affected by a final rule on mine rescue equipment.

In addition, the underground metal/non-metal (M/NM) sector awaits rulemaking to establish a revised numeric factor for converting total carbon (TC) to elemental carbon (EC) as part of ongoing rulemaking on diesel particulate matter. A final PEL of 160 micrograms per cubic meter, measured as TC, goes into effect May 20. Because of potential interferences from carbon sources in underground M/NM mines, a TC-to-EC conversion factor is necessary to confirm the TC measurement result.

## **8. MSHA PENALTY INCREASES CONTINUE**

Penalty increases that MSHA put in place last year were so large and comprehensive the mining industry may not have noticed that some penalties were left untouched. But MSHA noticed, and last month the agency issued a final rule raising fines for them.

The maximum civil penalty went from \$60,000 to \$70,000. That fine is levied when an operator is assessed 144 or more points on the penalty table. The maximum daily penalty for failure to abate jumped to \$7,500 from \$6,500, and the top fine levied against miners for smoking or carrying smoking materials underground rose to \$375 from \$275. The increases were effective March 10.

The fines were raised to adjust for inflation, a requirement of the Debt Collection Inflation Act of 1996. Under the law, fines are to be adjusted every four years. The inflation rate over that period ending last June was about 13.4%, MSHA said. The maximum civil and daily penalties were last raised in 2003, while the most recent change in the smoking fee occurred in 1998. MSHA estimated the fines would have little or no financial impact on mine operators and miners.

## **9. ENERGY COMPANY HIT WITH \$20 MILLION POLLUTION PENALTY**

A coal company has agreed to pay a \$20 million civil penalty to settle Clean Water Act violations at its coal operations in West Virginia and Eastern Kentucky.

In announcing the consent decree, the Environmental Protection Agency (EPA) and the Justice Department said it was the largest penalty in EPA's history for violations of permits governing wastewater discharge.

"This is a landmark settlement for the environment, and raises the bar for the mining industry," said EPA official Granta Nakayama. "We will be setting a new standard for environmental compliance in coal mining," the company's chief administrative office said in a prepared statement.

In a complaint filed last May, the government alleged the company violated its Clean Water Act permits more than 4,500 times between January 2000 and December 2006. The complaint charged that the company discharged excess amounts of metals, sediment, and acid mine drainage into hundreds of rivers and streams in the two states.

The complaint also accused the company of spilling large amounts of slurry, which is a mixture of waste-containing metals and sediment, into local waterways numerous times. Sediment can clog streams and harm fish habitats. The spills were due to failures in handling coal slurry.

In addition to the penalty, the company will invest approximately \$10 million to develop and implement a comprehensive environmental compliance program covering all its operations. It includes putting in place an innovative electronic tracking system to address compliance problems quickly and correct any violations of permit limits. In addition, there will be in-depth internal and third-party audits, employee training, and a plan to prevent future slurry spills.

The company will also set aside 200 acres of riverfront land in West Virginia for conservation purposes and protection from future mining, and is required to perform 20 projects downstream from mining operations.

## **10. SENATE REPORT CALLS FOR CRIMINAL PROBE INTO CRANDALL CANYON TRAGEDY**

A Senate committee has called for a criminal probe into the Crandall Canyon mine tragedy because the operator allegedly engaged in dangerous and unlawful mining practices while MSHA failed to properly fulfill its oversight duties.

The recommendation was contained in a scathing 75-page report released March 6 of a months-long investigation conducted by the Senate Health, Education, Labor and Pensions (HELP) Committee. Six miners died in a cave-in at the Utah underground coal mine last August, and three others were killed in another cave-in during a rescue attempt 10 days later.

“The record compiled by the investigation shows that Murray Energy was operating a dangerous mine in a potentially dangerous manner, was lax about or hostile to safety, and was bullying a compliant MSHA,” the report said. Murray Energy, based in Cleveland, Ohio, operated the mine through a subsidiary.

Along with the report, investigators released 135 exhibits designed to support their findings that Murray’s mining plans were flawed, the company ignored numerous instances of ominous seismic activity called bounces in the mine, and failed to report a major ground failure, as legally required. For its part, MSHA failed to rigorously review Murray’s mining plans, overrode the recommendations of its own engineer, and illegally allowed Murray to relax requirements for reporting bounces, congressional investigators said.

A Justice Department spokesman said the agency would review the committee’s request for a criminal prosecution.

In a prepared statement that accompanied release of the report, HELP Committee chairman Ted Kennedy (D-MA) said the findings “greatly underscore the urgent need for mine safety reform. I am committed to working on a bill that would prevent other such disasters from happening.” That legislation is believed to be the Senate version of the House-passed S-MINER bill.

Both Murray and MSHA condemned the report. Murray attorney Michael McKown called it “sensational and irresponsible.” He charged the report was “biased,” contained “slanderous allegations,” and was politically motivated.

The Department of Labor is conducting a review, and another report will come out of MSHA’s own probe of the accident, which spokesman Matt Faraci described as “the official investigative report.” That report will identify root causes and specify appropriate enforcement actions, including any criminal referrals, he said. “Until the MSHA Accident Report and the DOL Independent Internal Review are concluded, any speculation by Senator Kennedy’s staff is premature and inappropriate,” Faraci said.

Meanwhile, a separate investigation by the House Committee on Education and Labor continues. The House panel has subpoenaed two Murray officials, including CEO Robert E. Murray, to testify behind closed doors next week. Yet another investigation is underway by DOL’s Inspector General.

## **11. OSHA NOTIFIES EMPLOYERS OF HIGH INCIDENCE RATES**

Early this month, OSHA sent letters to 14,000 employers across the country alerting them that their occupational injury and illness rates were above the national average.

The agency described the action as a proactive step to encourage employers to take action to improve safety and health conditions in their workplaces. "Our goal is to make them aware of their high injury and illness rates and to get them to focus on eliminating hazards in their workplace," OSHA chief Ed Foulke said.

The businesses were identified from a survey conducted in 2007 of 80,000 workplaces, and is based on employer-submitted data from 2006. Notifications went to businesses with 5.4 or more injuries resulting in days away from work, restricted activity, or job transfer. Nationally, the average is 2.3 occurrences per 100 workers, OSHA said.

The letters include a copy of the company's injury and illness data, a list of the most frequently cited OSHA standards for their specific industry, and suggestions for help in turning the numbers around. The agency has been sending such letters for many years.

Employers who receive the notices should know they are on OSHA's enforcement radar screen. As such, they may wish to seek advice from counsel. Patton Boggs' environment, safety, and health practice has decades of experience on OSHA enforcement issues. Contact Henry Chajet (202-457-6511, [hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com)) or Mark Savit (303-894-6117, [msavit@pattonboggs.com](mailto:msavit@pattonboggs.com)).

## 12. MSHA SAYS "NO" TO MINE OPERATORS ON CONFERENCING CITATIONS

MSHA has rejected an appeal from mining trade groups to rescind a controversial Procedure Instruction Letter (PIL) aimed at limiting safety and health conferences to serious violations only.

In a letter March 5, Acting Assistant Secretary Richard E. Stickler stood by the PIL, issued last month, which encouraged District Managers to limit conferences only to alleged violations involving high negligence and unwarrantable failure. The PIL also requested that the existing backlog of lesser cases be sent immediately for assessment.

Mine operators are faced with an avalanche of higher enforcement costs due to penalty increases MSHA put in place last year. As a result, they are seeking to resolve disputes through the informal conference process as never before, creating a backlog that the PIL is intended to alleviate. Administrative litigation before the Mine Safety and Health Review Commission is the only option open to operators for dispute resolution once they exhaust all informal procedures.

Stickler said operators have other informal options at their disposal besides conferencing. They could try to resolve issues during the walk-around with the inspector or at the close-out conference. He also reminded operators that safety and health conferences are granted at the sole discretion of the District Manager.

The National Mining Association and the Industrial Minerals Association-North America were among the trade groups that protested in letters to the agency after the PIL was released in early February.

Patton Boggs attorneys offered advice to operators on this development during the ConExpo trade show this week in Las Vegas, and are readily available to assist with MSHA enforcement issues. Contact Henry Chajet (202-457-6511, [hchajet@pattonboggs.com](mailto:hchajet@pattonboggs.com)) or Mark Savit (303-894-6117, [msavit@pattonboggs.com](mailto:msavit@pattonboggs.com)).

## 13. LAWMAKERS PROD OSHA ON COMBUSTIBLE DUST

Responding to an explosion at a Georgia sugar plant last month that left 12 people dead and 11 others critically injured, lawmakers in the House have introduced legislation to force OSHA to write protective regulations.

"OSHA should stop dragging its feet and immediately begin work on developing a mandatory standard to protect workers," commented California Democrats George Miller and Lynn Woolsey in a press release the day after the tragedy.

H.R. 5522 would require OSHA to issue an interim final standard regulating combustible dusts within 90 days and a final rule within 18 months. The regulation would apply to the manufacturing, processing, blending, conveying, repackaging, and handling of combustible particulate solids and their dusts in a variety of industries, including but

not limited to, coal, metals, food, plastics, wood, rubber, furniture, textiles, pesticides, pharmaceuticals, fibers, dyes, and fossil fuel power. Grain facilities already covered by an OSHA standard would be excluded.

The measure would require the OSHA rule to provide no less protection than provisions of two voluntary standards – 654 and 484 – issued by the National Fire Protection Association. The bill would also require an amendment to OSHA's Hazard Communication Standard. It was introduced March 4 by Miller and Rep. John Barrow (D-GA).

After three dust explosions claimed 14 lives in 2003, the Chemical Safety Board issued a report in November 2006 that called for regulatory action by OSHA. OSHA has issued an information bulletin on the hazard and launched a national emphasis program.

But Miller and Barrow say that is not enough. "Without an OSHA standard, many employers are unaware of the hazards of combustible dusts and control methods, and others have not taken advantage of voluntary standards," they said.

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The [Patton Boggs Health and Safety Law Group](#) consists of attorneys who have resolved client problems in environmental, energy, natural resource, and safety and health law since the late 1960s. With lawyers in Washington, D.C., Alaska, Colorado, Texas, New Jersey, New York, and Northern Virginia, we have experience with EPA, OSHA, MSHA, NIOSH, DOT, OPS, Coast Guard, NTSB, FAA, FDA, CSP, the Chemical Safety Board, and almost every other federal and state government environmental, health, and safety agency here and in many foreign governments around the world. We speak a variety of languages; have backgrounds in business, science, engineering, industry, and government; and combine preventive law counseling with courtroom and lobbying expertise to achieve results. For more information go to: <http://www.pattonboggs.com> or contact [Henry Chajet \(hchajet@pattonboggs.com\)](mailto:hchajet@pattonboggs.com) at 202-457-6511, [Mark Savit \(msavit@pattonboggs.com\)](mailto:msavit@pattonboggs.com) at 202-457-5269, [Cole Wist \(cwist@pattonboggs.com\)](mailto:cwist@pattonboggs.com) at 303-894-6159, or [John Austin \(jaustin@pattonboggs.com\)](mailto:jaustin@pattonboggs.com) at 202-457-6167

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