OSHA's Severe Injury Reporting and Proposed Electronic Reporting

WABA Safety Day
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What's Up at OSHA, Generally

- "Graying" of the agency => leadership crisis; field crisis
  - Rich Fairfax => Dorothy Daugherty
  - OSHA regional administrators/SOL senior lawyers
  - Turnover of area directors in Wisconsin
  - New COSHOs
- The Obama Administration's swansong
  - Lame duck?
  - More aggressive?
    - Rulemaking
    - "Subregulatory" activity

What's Up at OSHA, Generally (cont'd)

- Centralization of authority
  - Settlements
  - Fatality cases
  - SVEP
- Legacy rules/standards
  - I2P2
  - Combustible dust
  - Electronic recordkeeping
What's Up at OSHA, Generally (cont’d) - Top 10 Most Cited Standards

<table>
<thead>
<tr>
<th>Standards</th>
<th>FY 12</th>
<th>FY 13</th>
<th>FY 14</th>
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<td>Fall Protection</td>
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<td>Hazard Communication</td>
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<td>Scaffolding</td>
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<td>Respiratory Protection</td>
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<td>Ladders</td>
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<td>Machine Guarding</td>
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<td>Powered Industrial Trucks</td>
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<td>9.</td>
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<td>Lockout/Tagout</td>
<td>8.</td>
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<td>10.</td>
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<td>Electrical, General Requirements</td>
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<td>10.</td>
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Data Source: OSHA Standards Cited

Rulemaking – Final Rules “Planned”

- Most recent agenda published in Spring 2015
- “Final Rule Stage”:
  - Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention)
  - Updating OSHA Standards Based on National Consensus Standards Eye and Face Protection
  - Improved Tracking of Workplace Injuries and Illnesses
  - Approved State Plans for Occupational Safety and Health
  - Procedures for Handling Employee Retaliation Complaints Under the National Transit Systems Security Act; Surface Transportation Assistance Act; and Federal Railroad Safety Act

Rulemaking – Final Rules “Planned” (cont’d)

- “Final Rule Stage”:
  - Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records
  - Procedures for the Handling of Retaliation Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, as Amended
  - Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act of 2010
  - Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Moving Ahead for Progress in the 21st Century Act
Rulemaking – Proposed Rules in Pipeline

- Beryllium
- Amendments to Crane and Derricks in Construction
- Clarification of Employer’s Continuing Obligation to Make and Maintain Accurate Records of Each Recordable Injury and Illness
- Crane Operator Qualification in Construction
- Standards Improvement Project IV

Rulemaking – Other Rules in Pipeline

- Chemical Management and Permissible Exposure Limits (pre-rule)
- Bloodborne Pathogens (pre-rule) (findings from review of the standard expected in May 2015)
- Combustible Dust (pre-rule)
- Process Safety Management and Prevention of Major Chemical Accidents (pre-rule)
- Updating of PELs (pre-rule)
- Communication Tower Safety (pre-rule)

Rulemaking - Reporting

- September 2014 OSHA released final rule that requires:
  - Effective January 1, 2015 - Employers must notify OSHA of:
    - Work-related fatality within 8 hours
    - Work-related in-patient hospitalization, amputation or loss of an eye within 24 hours
  - Prior rule required employer to notify OSHA within 24 hours of:
    - Work-related fatality
    - In-patient hospitalizations of 3 or more employees
Rulemaking – Reporting (cont’d)

- Huge increase in work for OSHA to do – 200-250 reports per month.
- So … system of “triaging” reports for inspection necessary.
- “RRI” System
  - Reports requiring inspection (fatalities, amputations, etc.)
  - Reports fit for “rapid response investigation” – RRI
  - Reports not covered by rule

Rulemaking – Reporting (cont’d)

- Inspection for sure where:
  - Fatality
  - Hospitalization of two or more employees
  - Victim 18 or under
  - History of multiple injuries
  - Repeat offenders
  - SVEP
  - NEP/LEP
  - Imminent danger

Rulemaking – Reporting (cont’d)

- Inspection potentially where (combination):
  - Employees still exposed
  - Incident a result of safety program failure
  - Employee exposed to “serious hazard”
  - Temporary workers involved/exposed
  - Prior inspection history
  - Referral
  - Whistleblower complaint pending
  - Employer part of cooperative program
  - Employee exposure to health issues
Rulemaking – Reporting (cont’d)

- RRI Employees still exposed
  - Similar to “phone and FAX” complaint investigation
  - Five-day response time – in writing
  - “Please” … posting/certification – NO!!!
  - “Non-Mandatory Investigative Tool”
    - “Detailed description”
    - Witness statement details
    - Root cause analysis
    - “Recommended corrective actions”
    - Actions taken/root causes addressed

Rulemaking – Reporting (cont’d)

- Problems/awareness points
  - Attorney-client/attorney work product privilege
  - Doing OSHA’s job
  - Root cause analysis
  - Witness identity/statement disclosure
  - Posting/certification
  - Use of form v. own form/document
  - Abatement/“recommendations”/“corrective action”
  - Ammunition for OSHA in future (willful)

Rulemaking – Reporting (cont’d)

- Alternative responses to RRI call/letter
  - Comply fully
  - Don’t comply at all => likely inspection (so??)
  - Respond in part
    - No root cause analysis
    - No production of privileged info/documents
    - No identification of witnesses/statements
    - No commitment to “abatement”/corrective action
    - Use of own form/format
Rulemaking – Electronic Injury/Illness Reporting

- "Improved Tracking of Workplace Injuries and Illnesses" – Notice of Proposed Rulemaking published November 2013
- Comment period closed October 14, 2014.
- Final rule anticipated September 2015.
- Would require quarterly reporting (250 or > employees) and annual reporting (20 or > employees) of all illness and injury data to OSHA for publication on OSHA website.
- Clear goal: shaming

Rulemaking – Electronic Injury/Illness Reporting
(cont’d)

- Problems
  - Not authorized by 1910.1904 or OSHAct.
  - Would disclose confidential information on employers and employees and proprietary information (hours worked).
  - Could result in competitive injury.
  - Would not provide tools for understanding/use of data.
  - Would provide no mechanism for correction of data (work-relatedness; DAFWIs; DARTs; …).

Rulemaking – Electronic Injury/Illness Reporting
(cont’d)

- Amended NPRM published in August 2014
  - Would prohibit employers from "discouraging" reporting by employees (already covered by OSHAct 11(c) and rules/standards).
  - Would provide OSHA avenue to investigate retaliation without employee complaint.
  - Would require employers to ally inform employees how to report injuries/illnesses.
  - Would prohibit employers from creating "unreasonably burdensome requirements" for reporting injuries/illnesses.
Rulemaking – Eye, Face PPE (Proposed)

- Would adopt ANSI Z87.1-2010 for all industries.
- Would revise construction standard to align with other industries’ standards.
- Old gear grandfathered so long as complies with 1989, 2003 (not 1968) ANSI standards.
- Comment period closed April 13, 2015.

Enforcement Activities – Kinesiology Tape/Recordability

- First aid v. medical treatment under 29 CFR 1904.7?
- December 12, 2014, Letter of Interpretation:
  - Tape designed to reduce pain “through physiological and neurological mechanisms by relieving pressure on pain receptors directly under the skin”.
  - Therefore, like physical therapy.
  - Therefore, use of tape is medical treatment beyond first aid.
  - Therefore, recordable under 29 CFR 1904.7(5)(ii)(M).
- But elastic bandages, wraps, non-rigid back belts not medical treatment/recordable. 29 CFR 1904.7(b)(5)(ii)(F)

Enforcement Activities - SVEP

- SVEP (“Severe Violator Enforcement Program”).
- Following circumstances will be reviewed for possible handling as SVEP case:
  - Fatality or catastrophe with one willful or repeat citation or failure-to-abate (FTA) notice;
  - Industrial operations or processes exposing employees to “high-emphasis hazards”, with two or more high-gravity willful or repeat citations or FTA notices;
  - Exposure of employees to hazards related to potential release of highly hazardous chemical, with three or more high-gravity willful or repeat citations or FTA notices; or
  - An egregious (per-instance/ per-employee citation) enforcement action.
Enforcement Activities - SVEP (cont’d)

- SVEP “action elements” for employers who meet SVEP criteria:
  - Enhanced follow-up inspections
  - Nationwide referrals, to include state plan states.
  - Increased publicity, to include news releases
  - Enhanced settlement provisions (e.g., full time safety specialist, inspections without warrant, reports to OSHA)
  - Increased use of federal court enforcement action (contempt of court) under Sec. 11(b) of OSH Act (one case referred to Solicitor/filed with court)
  - Corporate-wide settlement agreements

- Big problem: how to get out of SVEP once in it?
  - Employer must ask.
  - Three years since “final disposition” of SVEP case
  - No citations since for similar alleged violations; otherwise three more years before reevaluation
  - After follow-up inspection (abatement)
  - In discretion of Region if no corporate-wide settlement; in discretion of OSHA HQ otherwise
  - Public log – deletion/line-out

Enforcement Activities – National Emphasis Programs - Others

- Other NEPs
  - Nursing and Residential Care Facilities
  - Chemical Plants (PSM)
  - Primary Metals
  - Shipbreaking
  - Hexavalent Chromium
  - Food Flavorings/Diacetyl
  - Lead
Enforcement Activities – National Emphasis Programs – Others (cont’d)

- Other NEPs (cont’d)
  - Combustible Dust
  - Crystalline Silica
  - Amputations
  - Trenching
  - Isocyanates (under development)

Enforcement Activities – Incentive Program Directive

- OSHA hates incentive/disincentive programs based on belief they discourage injury/illness reporting – “intentionally or unintentionally”.
- Culprit programs subject to scrutiny/citation are “blame the employee” programs.
- Focus should not be on fact/frequency of injury:
  - Underlying conduct leading to injury
  - Accounting for near misses

Hot Issues

- Workplace Violence
- Health Hazards
- Heat campaign
- Fall Protection campaign
- Customer Service
Enforcement Activities – Whistleblower

- Investigators now must make “every attempt to interview complainant; intake supervisor must insure coverage requirements met, prima facie case elements identified.
- New guidance to ensure consistency and quality of investigations
- Rulemaking in works regarding procedures.
- April 20, 2015, Memorandum: “Reasonable cause” standard lower than “preponderance of the evidence” standard for proof in investigation — could “reasonable judge” find in favor of complainant?