OSHA Update and National Emphasis Programs

Pulp and Paper Safety Association 2010 Safety Conference
Sponsored by: Pulp and Paper Safety Association
June 7, 2010

Eric E. Hobbs, Esq.
Michael Best & Friedrich LLP
eehobbs@michaelbest.com
414.225.4991
"To those who have for too long abused workers, put them in harm's way, ... let me be clear, there is a new sheriff in town."

Hilda Solis
U.S. Labor Secretary
“Secretary Solis' phrase that ‘There's a new sheriff in town’…. is not an abstract wish; it's a description of how OSHA is now working.”

David Michaels
Assistant Secretary of Labor For Occupational Safety and Health
New Assistant Secretary - David Michaels, Ph.D.

- Confirmed by unanimous consent - December 3, 2009
- Former Asst. Secretary of Energy for Environment, Safety and Health
- George Washington University Researcher
- CIH
- Priorities: Streamline rulemaking; set health exposure limits for hazardous chemicals; adopt mandatory s/h program standard
New Political Deputy Asst. Secretary – Jordan Barab

- Former Acting Assistant Secretary – April 13, 2009, to December 3, 2009
- Former Senior Policy Advisor on s/h – House Education and Labor Committee
- Former member, U.S. Chemical Safety and Hazard Investigation Board
New Career Deputy Asst. Secretary – Rich Fairfax

- Former Director of Directorate of Enforcement, Construction Directorate
- Long-term career OSHA executive
- Guru of enforcement
- Yin to Barab’s yang
New Solicitor of Labor – Patricia Smith

- Very controversial appointment
- Confirmed by party-line vote on February 4, 2010: 60-37
- Former NYS Labor Commissioner
- Former Chief, NYS Attorney General’s Labor Bureau
Occupational Safety and Health Review Commission

- First full complement since April 2007
- Backlog of cases
- Likely to get busier
OSHRC New/Old Chair - Thomasina Rogers

- Confirmed by unanimous consent May 13, 2009.
- Three-term member of Commission; Chair during Clinton Administration
- Former Chair, Administrative Conference of the United States
- Former Counsel, Equal Employment Opportunity Commission
OSHRC New Member – Cynthia Attwood

- Confirmed by unanimous consent February 11, 2010.
- Former Associate Solicitor for Occupational Safety and Health, Associate Solicitor for Mine Safety and Health
- Former Administrative Appeals Judge, U.S. Department of Labor Administrative Review Board
OSHRC Member – Horace (Topper) Thompson

- Chair during Bush II Administration
- Southern gentleman
- Consensus Builder
FY 2010 Most Frequently Cited Standards

1. Scaffolding, general requirements, construction (29 CFR 1926.421)
2. Fall protection, construction (29 CFR 1926.501)
5. Ladders (29 CFR 1926.1053)
FY 2010 Most Frequently Cited Standards

7. Electrical, wiring methods, components and equipment (29 CFR 1910.305)
10. Electrical system design (29 CFR 1910.303)
Most Significant Fines issued in 2009

1. Largest fine ever: $87.4 million - BP
   - Penalized for its failure to abate 270 previously cited hazards, along with 437 new willful violations
   - Prior record set in 2005 for $21 million to BP

2. Prison time and fines – RPI Coating
   - Two executives facing 2.5 years in prison and $1.25 million fine
   - OSHA says it will be working more closely with the Department of Justice in cases like these.
   - OSHA cited on a per instance basis – 21 egregious willful citations for hazardous chemical handling.
   - $1.2 million fine

4. Employee Complaints – Milk Specialties
   - Inspection resulted from employee complaint – not related to a death or multiple serious injuries.
   - Willful citations for failure to comply with confined space and lockout/tagout regulations
   - $1.14 million fine
5. Owner & supervisor jailed – ANC Roofing
   - Two workers fell through unprotected skylights, 4 months apart.
   - Owner sentenced to 9 months in jail and fined $248,000.
   - Supervisor sentenced to 30 days in jail.

6. Worker trampling incident - Walmart
   - Employee trampled by shoppers on Black Friday, 2008.
   - Employer should have been aware of the danger.
Most Significant Fines issued in 2009

7. Per instance fines – Smalis Painting Co.
   - OSHA monitored 6 employees for lead exposure.
   - Issued 202 willful violations – 1 violation for each exposed employee.
   - Employer facing potential fines of $1.09 million.

8. Make changes and reduce fines – A-1 Excavating
   - Employer agrees to implement safety and health improvements beyond what’s required by regulations.
     - Hire full time safety director and third-part consultant
     - Reduce salary of supervisors/managers who fail to comply with OSHA requirements
     - Create site specific health and safety plans for all major projects
     - Notify OSHA of all job sites before work begins for 3 years
   - In exchange OSHA cut proposed fines almost in half to $470,000.
9. Fines and other conditions – Cintas
   - Worker death resulted in $3 million fine.
   - Employer agreed to
     - hire additional safety staff;
     - Conduct more frequent safety inspections; and
     - Establish new system to review employee complaints.

10. Fines and other conditions – Broadway Concrete
    - Employer agreed to pay $750,000 and
    - Implement changes:
      - Reduce salaries of senior supervisors who fail to comply with job safety practices;
      - Hire full time safety director;
      - Develop corporate safety plan; and
      - Provide OSHA with information on major projects and access to all job sites for next four years.
FY 2006 – 2010 (Oct. 1- Feb. 14) Inspectors Conducted

<table>
<thead>
<tr>
<th>Year</th>
<th>Inspections</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>38,579</td>
</tr>
<tr>
<td>FY07</td>
<td>39,324</td>
</tr>
<tr>
<td>FY08</td>
<td>38,450</td>
</tr>
<tr>
<td>FY09</td>
<td>39,004</td>
</tr>
<tr>
<td>FY10</td>
<td>12,989</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 % Inspects Programmed v. Unprogrammed
FY 2006 – 2010 Percent Complaint Inspections
FY 2006 – 2010 % Inspections In-Compliance

<table>
<thead>
<tr>
<th>Year</th>
<th>% In-Compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>27%</td>
</tr>
<tr>
<td>FY07</td>
<td>26%</td>
</tr>
<tr>
<td>FY08</td>
<td>23%</td>
</tr>
<tr>
<td>FY09</td>
<td>25%</td>
</tr>
<tr>
<td>FY10</td>
<td>17%</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 Total Citations Issued

<table>
<thead>
<tr>
<th>Year</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>82,804</td>
</tr>
<tr>
<td>FY07</td>
<td>87,898</td>
</tr>
<tr>
<td>FY08</td>
<td>86,945</td>
</tr>
<tr>
<td>FY09</td>
<td>87,663</td>
</tr>
<tr>
<td>FY10</td>
<td>33,078</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 % Total Citations Issued As Serious

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>73%</td>
</tr>
<tr>
<td>FY07</td>
<td>76%</td>
</tr>
<tr>
<td>FY08</td>
<td>77%</td>
</tr>
<tr>
<td>FY09</td>
<td>77%</td>
</tr>
<tr>
<td>FY10</td>
<td>78%</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 % Total Citations Issued as S, W, R, & Unclass

FY06: 77%
FY07: 79%
FY08: 81%
FY09: 81%
FY10: 83%
FY 2006 – 2010 % Inspections w/ Only OTS Citations

<table>
<thead>
<tr>
<th>Year</th>
<th>% Inspections</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>12%</td>
</tr>
<tr>
<td>FY07</td>
<td>11%</td>
</tr>
<tr>
<td>FY08</td>
<td>10%</td>
</tr>
<tr>
<td>FY09</td>
<td>10%</td>
</tr>
<tr>
<td>FY10</td>
<td>10%</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 % Inspections w/ Citations Contested

FY06: 7%
FY07: 7%
FY08: 7%
FY09: 7%
FY10: 7%
FY 2006 – 2010 % Construction Inspections

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY06</td>
<td>59%</td>
</tr>
<tr>
<td>FY07</td>
<td>59%</td>
</tr>
<tr>
<td>FY08</td>
<td>60%</td>
</tr>
<tr>
<td>FY09</td>
<td>61%</td>
</tr>
<tr>
<td>FY10</td>
<td>57%</td>
</tr>
</tbody>
</table>
FY 2006 – 2010 Significant Cases

- FY06: 101
- FY07: 108
- FY08: 121
- FY09: 120
- FY10: 54
Significant Cases
Egregious Cases

FY86 FY87 FY88 FY89 FY90 FY91 FY92 FY93 FY94 FY95 FY96 FY97 FY98 FY99 FY00 FY01 FY02 FY03 FY04 FY05 FY06 FY07 FY08 FY09 FY10
FY 2006 – 2010 Fatality Investigations
OSHA’s NEPs For 2010

- Recordkeeping
- Combustible Dust
- Chemical Manufacturers - PSM
- Petroleum Refineries - PSM
- Hexavalent Chromium
- Construction
- Silica
- Food Flavoring - Diacetyl
Recordkeeping

- New national emphasis program
- Response to organized labor complaint of underreporting
- OSHA has not found cases of underreporting, but is “taking seriously” stakeholder allegations.
Recordkeeping (cont’d)

- Focus on “high-hazard” industries.
- OSHA will conduct recordkeeping audits and inspections of 1000 nursing homes/personal care facilities before October 2010.
- BUT NEP not limited to acute health care.
Focus on industries with perceived combustible dust issues – including “paper products”.

Definition of “combustible dust”: “A combustible particulate solid that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape”
Combustible Dust (cont’d)

- NEP “will focus on general industry facilities where employees may be exposed to potential combustible dust hazards”.
- Sample collection – still an Achilles heal
- Citation still under Housekeeping Standard (1910.22), General Duty Clause, unless particular industry standard (e.g., grain handling)
Chemical Manufacturing - PSM

- One-year pilot program launched July 27, 2009
- Programmed inspections of facilities in Regions I, VII and X – based on previous fatalities, complaints, prior incidents/citations
- Focus on chemical manufacturer compliance with Process Safety Management Standard (1910.119)
Petroleum Refinery PSM

- Prompted by BP explosion and recent $84.7M in proposed penalties for failure to comply with settlement agreement.
- Expands pilot program.
- Focus on compliance with PSM Standard (1910.119), but not only PSM Standard
Hexavalent Chromium

- Effective February 23, 2010
- Focus on “stronger enforcement” of Hex Chrom Standard (1910.1026)
- Follow up to 2008 compliance directive to field
- Inspections of industries with likely exposures from welding on stainless steel, electroplating, painting, etc.
Construction

- Provides for increased inspection of sites at which work funded by Stimulus Act (ARRA) monies being done.
Silica

- Expands 1996 Special Emphasis Program, which focused on construction.
- Includes all industries where silica exposure may occur.
- Citation under 1910.1000(e), 1926.55(b), or 1926.57(a) and (b), “as appropriate”
Food Flavoring - Diacetyl

- Designed “to identify and reduce or eliminate hazards associated with exposures to flavoring chemicals in facilities that manufacture food flavorings containing diacetyl”.

- Does not “apply to facilities that use flavoring chemicals in the manufacturing of food products”.
Food Flavoring – Diacetyl (cont’d)

- Expands earlier NEP focusing only on microwave popcorn manufacturing facilities.
- Covers 83 facilities in federal enforcement states (shhhhh, the list is secret).
- All must be inspected eventually.
New/Revised NEPs/Directives in the Works

- Isocynates (instead of asthma) NEP - new
- Amputations NEP – revision
- High-Hazard Facilities - new
- Tuberculosis directive - revision
- Bloodborne Pathogens directive – revision
- PSM directive - revision
Revised OSHA Internal Penalty Guidelines

- New Interpretation, April 2010
- Increase average penalty for serious citation from $1000 to $3500 (driven by gravity prong).
- Repeat citations up to 5 (v. 3) years after citation.
- Employer-size discounts reduced – max of 40% (v. 50%); none for employer of more than 250 employees (v. 500 employees).
- No good faith discount if high gravity.
- 15% (v. 30%) discount for “quick fix”.
- History of violations now only an aggravator; no discount for good history.
Protecting America’s Workers (PAWs) Act

- Significantly increase penalties.
- Expand criminal enforcement and extend it to “responsible” company representative (undefined).
- Expand coverage to public employers.
- Increase protection of whistleblowers.
Other Proposed Legislation

- Nurse and Health Care Worker Protection Act – require installation of Heuer Lifts in all health care facilities.

- Whistleblower Protection Enhancement Act – strengthen whistleblower protection under multiple federal statutes.
Rulemaking Underway

- Hazard Communication Standard – revision to include global harmonization.
- Combustible Dust – ANPRM published October 2009
- Occupational Injury and Illness Recording and Reporting – revision to reinstate column on 300 Log for MSDs
- Crane and Derrick Standard – new rule; target of July 2010
- Confined Spaces Standard for Construction – new; no action until Crane and Derrick Standard published
- Diacetyl Rule – new rule scheduled for October 2010
- Chemical Plants – Process Safety Management
Guidance And Training

- Small Businesses
- Scaffolding
- First Responders
- Silica
- Respiratory Protection
- Lasers
- Penalties
Guidance And Training (cont.)

- Safe egress from trenches
- Employer pay for equipment
- Respirator medical records
- Highway construction workers
Enforcement Activities

- SVEP ("Severe Violator Enforcement Program")

- The following circumstances will be reviewed for possible handling as SVEP cases:
  - A fatality or catastrophe situation;
  - Industrial operations or processes that expose employees to the most severe occupational hazards and those identified as “high-emphasis hazards”; or
  - Exposure of employees to hazards related to the potential release of a highly hazardous chemical; or
  - An egregious enforcement action.
SVEP (cont’d)

- “High-emphasis hazards” means *only* high gravity serious violations of specific standards covered under falls or following NEPs:
  - amputations,
  - combustible dust,
  - crystalline silica,
  - lead,
  - excavation/ trenching, and
  - shipbreaking,

- Regardless of the type of inspection being conducted.
SVEP (cont’d)

- SVEP also includes following “action elements” for employers who meet SVEP criteria.
  - Enhanced follow-up inspections;
  - Nationwide referrals, to include State Plan States;
  - Increased company awareness, to include News Releases;
  - Enhanced settlement provisions; and
  - Increased use of Federal court enforcement action (contempt of court) under Sec. 11(b) of the OSH Act.
Corporate-Wide Settlement Agreements

- Corporate Wide Settlement Agreements
  - Tied into the SVEP
  - In cases of systemic patterns of violations
  - Directive is out for review and concurrence.
Criminal Liability

✓ OSHA referring all potential criminal case to DOJ for review

✓ Prosecutor Must Prove:
  ✓ The employer willfully violated a specific OSHA standard, rule, order or regulation; and
  ✓ The employer’s violation cause the death of an employee.
Cases

- W.G. Yates & Sons Construction Co v. OSHRC (5th Cir. 2006) – Supervisory employee’s misconduct not imputable to employer unless misconduct was foreseeable by employer.
Cases (cont’d)

- United States v. L.E. Myers Co. (7th Cir. 2009)
  - (1) Supervisory knowledge imputable to employer only if knowing employee had duty to report or ameliorate hazard; (2) deliberate ignorance provable only with showing that employer took deliberate steps to ensure it did not gain knowledge of nature of problem.
Cases (cont’d)

- Secretary of Labor v. Summit Contractors Inc. (OSHRC July 27, 2009) (on remand from 8th Cir.) - General (i.e., controlling) employer may be liable for exposure of other employers’ employees depending upon degree of supervisor capacity practiced by first employer and nature/extent of safety measures it employs.
Cases (cont’d)

- Nat’l Assoc. of Home Builders v. OSHA (D.C. Cir. 2010) – OSHA has prosecutorial discretion to cite on per-employee basis for violations related to PPE provision, safety training (affirming OSHA’s new rule re per-employee citation).