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# Edison Electric Institute Safety and Industrial Health Committee

## OSHA Update

***Stephen C. Yohay***

*October 1, 2007*

*Tucson, AZ*

## ***Edison Electric Institute v. OSHA (3d Cir).*** **(Judicial challenge to OSHA Standard on Hexavalent Chromium)**

- Petitioners EEI and Public Citizen Health Research Group filed briefs May 24, 2007
- OSHA'S brief due October 4, 2007
- EEI and PCHRG reply briefs due October 18, 2007
- EEI (now the ONLY industry petitioner) argued:
  1. There is no record evidence showing significant risk to power plant employees, or that standard would be feasible in power plants; also, no discussion of nuclear plants
  2. If OSHA had treated power plants as it does construction, standard might be tolerable

## ***Edison Electric Institute v. OSHA*** ***(3d Cir).***

### **(Judicial challenge to OSHA Standard on Hexavalent Chromium)**

- Public Citizen attacks OSHA decision to set permissible exposure limit at 5 ug/m<sup>3</sup> after proposing to set PEL at 1 ug/m<sup>3</sup>
- Specialty Steel industry settled its challenge, but remains as intervenor to help OSHA defend 5 ug/m<sup>3</sup> PEL
- Both EEI and Public Citizen criticize OSHA for relying exclusively on data taken from chromium industry, and applying it to other industries

# What's *Not* Happening at OSHA

## *Nearly Everything...*

- Lockout tagout directive – promised at least 4 years ago - nothing
- Silica - nothing
- Construction advisory Committee nominations – no movement yet
- Proposed changes in 29 CFR Part 1910.269 and Part 1926, Subpart V – nothing

# Occupational Safety and Health Review Commission

- Now has two members: Chairman Horace (“Topper” Thompson) and Commissioner Thomasina Rogers
  - New nominee: Cynthia Douglass – longtime Dept. of Labor minor officials
- *Summit Contractors, Inc.*
- *Burkes Mechanical, Inc.*

# *Summit Contractors, Inc.*

- The Review Commission majority (2-1) held that where work is "for construction" as defined in 29 CFR 1910.12, an employer may not be cited for a violation unless one of its own employees is exposed to the cited hazard, even if the employer (such as an owner or general contractor) is regarded as the "controlling employer" on a multi-employer jobsite.
  - Note that this does not apply where work is NOT "for construction," but is subject to OSHA's general industry standards in 29 CFR Part 1910.
- OSHA has appealed to the US Court of Appeals for the 8th Circuit in St. Louis.
  - The briefs of the employer, and its *amici curiae*, are due in a few weeks. OSHA will then doubtless file a reply brief, and several months thereafter, the court will hear oral argument. Months after that (when it chooses), the court will issue a decision.

## *Summit Contractors, Inc.*

- OSHA apparently refuses to honor the Review Commission decision in that as enforcement policy, it continues to issue citations under its multi-employer citation policy, as it has for the past 30 years or so.
  - It's not yet clear if the Review Commission's administrative law judges will dismiss such citations based on *Summit*.
- Note that this affects only states subject to federal OSHA jurisdiction, not states that have state plans. They have their own rules.
- What to do if cited under multi-employer theory?  
Motion to dismiss citation?

## ***Burkes Mechanical, Inc.* No. 04-475 (July 2007)**

- Commissioners Thompson and Rogers in agreement on major case involving 29 CFR 1910.147, lockout/tagout
- Where conveyor had not been deactivated and was running while accumulations of bark were removed from it, the standard applied even though there was no “unexpected energization.”
- Seems somewhat to undercut decision in *Reich v. General Motors, Delco Div.* 89 F.3d 313 (6<sup>th</sup> Cir. 1996) (LOTO standard applies only where machine can start up without employee’s foreknowledge)

# Rulemaking

*OSHA has sent 5 proposed rulemakings to OMB. The most important are:*

- Employer payment for Personal Protective Equipment final rule (which Asst. Secretary Foulke promised to issue by November). This was sent to OMB September 10, 2007
- Proposed rule for confined spaces in construction: preventing suffocation/explosions in confined space
  - Not clear how this rule will relate to “enclosed space” requirements in 29 CFR 1910.269, or existing general industry confined spaces standard, 29 CFR 1910.146.