

# EDISON ELECTRIC INSTITUTE SAFETY AND HEALTH COMMITTEE OSHA UPDATE



**Stephen C. Yohay**  
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**Alexandria, Virginia**

# ISSUES TO ADDRESS TODAY

- 3d Circuit decision in hexavalent chromium case
- OSHA Rulemaking on Proposed Standard for Cranes and Derricks in Construction
- Citation to First Energy on pad-mounted transformers
- Combustible Dust
- Speculation on voluntary programs
- Quick reminders on OSHA inspection principles

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# 3<sup>rd</sup> CIRCUIT DECISION ON HEXAVALENT CHROMIUM

- The good news
  - Court rejected arguments of Public Citizen Health Research Group; PEL remains 5  $\mu\text{g}/\text{m}^3$ , rather than 1  $\mu\text{g}/\text{m}^3$  sought by PCHRG
- The bad news
  - Court rejected all EEI arguments
  - Court did not address why the “construction” standard is not the more appropriate means of regulating intermittent exposure in utility work

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# 3<sup>rd</sup> CIRCUIT DECISION ON HEXAVALENT CHROMIUM

- Nothing about the standard has been changed by the decision.
- Utilities may continue to rely on historical data to show that monitoring for Chrome VI is not needed each time a utility enters an environment, as during an outage, when exposure to Chrome VI could occur. See 29 C.F.R. 1910.1026(a)(4) and 1910.1026 (d)(3)
- Housekeeping requirements apply in coal-fired power generation plants; and certain welding, including in nuclear power plants, is subject to the standard.

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# 3<sup>rd</sup> CIRCUIT DECISION –WHAT DOES EEI LEARN?

- EEI argued that the amount of Chrome VI contained in fly ash residue results in exposure levels below the exemption level.
- Court emphasized that EEI only provided OSHA with *nine samples* of ash during rulemaking that were incompletely labeled.
  - Court rejected arguments as to the difficulty of collecting samples, and EEI's surprise at coverage under the proposed standard
- Court deferred to OSHA's judgment that it's ok to use health evidence from one industry (chromate manufacturing) in entirely different work environment
  - Contradicts other decisions on which EEI relied.

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# 3<sup>rd</sup> CIRCUIT DECISION –WHAT SHOULD EEI LEARN?

- The lesson: To challenge proposed health standard that appears to create problems:

**LOTS OF EVIDENCE IS NEEDED**

- What health standard is coming next that would concern power plants? Most likely SILICA
- What does EEI need to do now?

**LOTS OF EVIDENCE IS NEEDED**

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# 3<sup>rd</sup> CIRCUIT DECISION –WHAT DO WE LEARN?

- OSH Act requires that when issuing a *health* standard, OSHA must impose protective measures to the extent “feasible”
- “Feasibility” includes economic considerations
- Court says a health standard is economically feasible if an affected industry will not be driven out of business by the regulatory requirements.
  - Presumably, the electric utility industry won’t be able to make this argument as to an OSHA health standard, no matter how onerous it is.
  - 3d Circuit ignored that other courts have required a “reasonable relationship” between costs and benefits

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- STATUS
  - Hearing conducted March 17-20, 2009
  - Post hearing submissions due May 19, 2009
  - Post hearing brief due June 19, 2009
- WHEN WILL IT BE ISSUED?
  - No-one knows
  - Widely assumed there will be pressure on OSHA to issue final standard relatively “soon”
- BUT, SEVERAL ISSUES AROSE AT THE HEARING CONCERNING ELECTRIC UTILITIES

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- Electric utilities are addressed in two capacities in the proposed standard:
  - As owners of energized overhead power lines
  - As employers whose employees and contractors use equipment that may be covered by the standard
- Utilities as owners: EEI's basic position
  - If an employer has no presence at a worksite, it is not "engaged in construction work" as defined in 29 CFR 1910.12(a)
  - An employer not "engaged in construction work" cannot be cited under an OSHA construction standard
  - Principle long-established in case law

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- Proposal would change 29 CFR Part 1926, Subpart V
- The overlapping proposals would govern the use of lifting equipment in construction work near energized electric power transmission and distribution lines and equipment.
- Would create a regulatory mess:
  - Prior proposals to modify Subpart V are still pending
  - The final rule should not include any changes to 29 C.F.R. Part 1926, Subpart V.

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- As to proposals that would require utilities to de-energize power lines upon contractor request:
  - OSHA was unaware that FERC and NERC regulate the issue of de-energizing transmission lines
  - OSHA unfamiliar in general with utility obligations to maintain reliability
- OSHA has no clue on what it would take to provide information on the voltage of a specific line

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- As to proposal for utility to develop jobsite plan with crane contractor to approach an energized power line, IBEW told OSHA:
  - Utility not likely to become involved in this exercise
  - Utility will likely advise crane operator just to stay away from power lines
- As to proposal for utility to “cover-up” energized lines and equipment upon crane contractor’s request, OSHA had not recognized that to do this would require a lineman to be exposed to energized equipment

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- As proposed, standard would apply to some digger derrick trucks, depending on their use
- Proposal would add never-before-seen requirement under Subpart V to determine that working outside clearance distances is “infeasible” before utility line trucks could be taken inside those distances
- IT WAS CLEAR – THE PEOPLE WHO WROTE THIS PROPOSAL DID NOT READ OR UNDERSTAND EXISTING SUBPART V, OR THE 2005 PROPOSAL TO REVISE SUBPART V AND 29 C.F.R. 1910.269

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# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- THE CONSTRUCTION ADVISORY COMMITTEE THAT REVIEWED THE C-DAC DRAFT STANDARD NEVER SAW A VERSION THAT PROPOSED TO INCLUDE WORK UNDER SUBPART V.
  - ADVISORY COMMITTEE NOT GIVEN THE OPPORTUNITY TO COMMENT ON THAT ASPECT OF THE PROPOSAL
  - THE PORTIONS ADDRESSING SUBPART V WORK SEEMED TO HAVE BEEN INJECTED AFTER THE ADVISORY COMMITTEE CONSULTATION

# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

- OSHA could not define the term “service truck”
- OSHA agreed that the proposal applies only to “construction” but admitted that it had not yet defined that term for purposes of this rule
  - **That is extraordinary!**
- NCCCO admitted that it has no program for certifying electric utility employees who operate equipment typically used in the industry
- NCCCO has no program for certifying anyone to audit an employer’s crane operator certification program

# PROPOSED STANDARD: CRANES AND DERRICKS IN CONSTRUCTION

## ■ PRE-EMPTION ISSUE

- State-plan states are free to adopt their own crane standards
- Non-state-plan states are not free to regulate occupational safety where OSHA has a standard addressing that issue
  - US Supreme Court ruled on this years ago.
  - For example, gloving statutes have been pre-empted by OSHA standards
- If OSHA issues a crane standard, states and local governments, like New York City, in states without state plans, cannot regulate crane safety for employees

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# PADMOUNT TRANSFORMER CITATION

Citation 1 Item 1 Type of Violation: SERIOUS

29 CFR 1910.269(l)(1)(i)(C): Except as provided in paragraph (l)(1)(ii) of this paragraph, at least two employees shall be present during installation, removal, or repair of deenergized lines if an employee is exposed to contact with other parts energized at more than 600 volts: were not utilized

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# PADMOUNT TRANSFORMER CITATION

- a. On or about 7-28-08 an employee assigned to work order #3718826 at 8680 Hunting Hill, Kirtland, Ohio, was working alone during transformer pad mounting activities.
- b. On or about 8-22-08 an employee assigned to work order #3738913 at 5739 Cardinal Drive, Mentor, Ohio, was working alone during transformer pad mounting activities.

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# PADMOUNT TRANSFORMER CITATION

- c. The prohibition against one man activity in transformer pad mounts and/or similar working environments has not been established throughout the company's 12 garage locations; rather, employees have a standing order to perform these activities at several garage locations, including but not limited to the company's Concord location.

# COMBUSTIBLE DUST

- This issue remains important
  - Bipartisan re-introduction of H.R. 849 The Worker Protection Against Combustible Dust and Fires Act by Rep. Miller (D-CA) and Rep. Barrow (R-GA)
  - WE Energies accident
  - No action expected on legislation – intended to spur a proposed standard, and continuation of National Emphasis Program
- Be vigilant about dust programs

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# OSHA INSPECTIONS – WHAT NOW?

## PREPARATION, PREPARATION, PREPARATION

- Once the Compliance officer shows up, its too late to train your jobsite people
- Project Owner, General Contractor, etc. can give consent to inspections of subcontractors
- OSHA's goal is simple where there's been an accident
  - What did they know and when did they know it?

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# PRINCIPLES TO REMEMBER, AND TEACH

- Especially now, OSHA is not there to “help you”
- “Making nice” won’t make them go away, especially after an accident
  - Be cordial and professional, but firm
- OSHA has no power to stop work – only a federal judge can do that if shown there is an “imminent danger”
- OSHA has no power to demand a site-freeze agreement, but it is usually agreed by the parties for insurance and claims reasons

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# PRINCIPLES TO REMEMBER AND TEACH

- Whatever anyone in supervision says (from lowest foreman to CEO) binds the company
  - It's OK to tell OSHA to wait for someone to arrive so that company's rights are protected
- If anyone in supervision is interviewed, the company has the right to be represented, whether by a safety person, another manager, or counsel
  - Important that your own people don't give away this right because they are afraid of not cooperating, or are intimidated by a compliance officer – TRAIN THEM!

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# PRINCIPLES TO REMEMBER AND TEACH

- What is said in the first few minutes of a foreman's interview can become "set in concrete"
- No-one is required to allow themselves to be recorded or to sign any statement
- Company should take this burden off managers and inform OSHA in opening conference that this will not be allowed
  - Only obligation – show up and tell truth
- Insist that document requests be in writing, given only to one person – keep log and copies of responses

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# PRINCIPLES TO REMEMBER AND TEACH

- Bargaining unit or hourly employees may be interviewed privately (or with Union steward present)
  - Not usually worth getting OSHA upset for employer to seek access to these interviews

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# PRINCIPLES TO REMEMBER AND TEACH

- Never, ever allow a compliance officer to walk around your jobsite unattended
- OSHA is allowed to photograph and video the jobsite, even from off-site
  - You take parallel video or photos
  - Don't rely on OSHA to share
- OSHA can take industrial hygiene samples
  - You take parallel samples

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# WHERE THERE IS A FATALITY...

- Remember to report to OSHA within eight hours
- Remember multi-employer policy
  - Just because it's not your employee does not necessarily mean you're off the hook
- **Nothing should happen in a fatality investigation without advice (and probably presence) of counsel**
  - OSHA routinely consults with local U.S. Attorney on fatalities to consider whether to start criminal investigation
  - Current OSH Act says a willful violation that is a cause of an employee's fatal accident can be a crime

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