

EEI Safety and Industrial Health Committee – Long Beach, CA

*OSHA UPDATE
Presented by*

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Issues to Discuss

- OSHA Proposed revision of 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V
- EEI Judicial Challenge to OSHA Standard on Hexavalent Chromium
- Occupational Safety and Health Review Commission Decisions and expiration of Chairman's term
- The "State of the Union" at OSHA

Proposed Revisions of 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V

- Public hearing was concluded
- No way to predict when final standards will be issued, or what they will require
 - Regulatory calendar prediction of June 2007 is fiction

EEL Judicial Challenge to OSHA Standard on Hexavalent Chromium

- Final standards issued February 28, 2006
- Permissible exposure limit at 5 $\mu\text{g}/\text{m}^3$
- Standard includes provisions requiring:
 - Cr(VI)-specific periodic air sampling or other performance-oriented determinations of worker exposure;
 - Respiratory protection;
 - Protective work clothing and equipment;
 - Housekeeping: OSHA specifically noted that electric power generation plants subject to “general industry” housekeeping requirements, that “all surfaces [be] maintained as free as practicable of accumulations” of Cr(VI);
 - Medical surveillance;
 - Recordkeeping.

Litigation Status

- April 27, 2006 - EEI filed a Petition for Review
- Several other industry groups also petitioned for review, planning to attack the standard.
- Public Citizen Health Research Group and certain organized labor groups petitioned – plan to contend that the Standard is too lenient.
- All cases consolidated in the U.S. Court of Appeals for the Third Circuit, in Philadelphia

Compliance was Required – Nov. 27, 2006

- The filing of lawsuits did not stay the standard
- No party has requested a stay, and none is expected.
- *MEMBER COMPANIES IN STATES SUBJECT TO FEDERAL OSHA ENFORCEMENT SHOULD BE COMPLYING WITH THOSE PORTIONS OF THE STANDARD THAT BECOME EFFECTIVE ON NOVEMBER 27, 2006.*
 - Note that the implementation of engineering controls to curtail exposure to Cr(VI) is not required until May 31, 2010.
- In state plan states, check if state has adopted the federal standard, and if so, when compliance is required.
- OSHA has not yet published any compliance guidance – Compliance Directive supposedly under development

Hex Chrome Litigation Status

- EEI met with OSHA twice, and submitted a detailed, written proposal for settlement
- In a letter dated November 29, 2006, OSHA rejected EEI's proposal, and stated it desired no further discussion with EEI
 - OSHA refused to treat power plant work involving exposure to hex chrome in coal fly ash as construction, rather than maintenance
 - OSHA ignored evidence that hex chrome in fly ash is likely no more hazardous than in Portland cement, which is exempt from the standard
 - OSHA refused to address issues in nuclear power plants

Hex Chrome Litigation Status

- OSHA HAS SETTLED WITH TWO PARTIES:
 - Electroplating Industry
 - Strange agreement – industry agreed to accelerate implementing engineering controls in exchange for delay in respiratory protection requirements
 - Building Construction Trades Dept. AFL-CIO
 - See memo from EEI on the EEI Website
 - If during inspection an OSHA Compliance Officer determines that “work involving Portland cement exposure is being performed,” the Officer must evaluate whether the “relevant employers” are in compliance with OSHA’s new cement-specific interpretations of several existing standards:

Hex Chrome Litigation Status

- Sanitation, 29 CFR §1926.51 (f).

Personal protective equipment, 29 CFR §1926.95.

Hazard communication (“hazcomm”), 29 CFR §1910.1200, made applicable to construction through 29 CFR §1926.59.

General safety and health training, 29 CFR §§1926.21 (b) and 1910.1200 (h).

Recordkeeping, 29 CFR Part 1904.

Hex Chrome Litigation Status

- BCTD Settlement – cont'd
 - If Compliance Officer determines that Portland cement is being used in a way that potentially exposes employees to inhaling Portland cement dust - such as when performing “terrazzo work, mixing mortar” or “jobsite mixing of concrete” — the inspector must evaluate the relevant employers’ compliance with OSHA’s construction standard on inhalation hazards (§ 1926.55, “Gases, Vapors, Fumes, Dusts and Mists”).
- What does BCTD Settlement mean to utilities whose contractors are using Portland cement?
 - In theory, no requirement that does not already exist on the construction work site;
 - In practice, there will be extra burden to assure that contractors understand their compliance obligations
 - Beware of multi-employer citations

Hex Chrome Litigation Status

- EEI and other Petitioners' Briefs due May 24, 2007
 - Parties agree and Court ordered – no more extensions
- Specialty Steel Industry continues to pursue settlement discussions – nothing yet
- No decision likely for at least 9-12 months

Occupational Safety and Health Review Commission

- Chairman W. Scott Railton's Term has expired, as of last week
 - No word on potential replacement
 - Lots of people have been asked if they are interested; few seem to be
 - Could mean a 1-1 split between Commissioners Thompson and Rogers until new member appointed

NEWSFLASH – OSHRC DECIDES SUMMIT CONTACTORS CASE

- OSHRC 2-1 majority reverses decades of precedent, and holds that for work defined as “construction” under 1910.12(a), OSHA cannot cite an employer who did not create a violative hazard, and whose employees were not exposed to the hazard.
- THIS DOES NOT AFFECT CITATIONS FOR “GENERAL INDUSTRY” work under Part 1910.
- Decision issued on April 27, 2007, last day of Mr. Railton’s term – can be found on OSHRC website

SUMMIT CONTRACTORS DECISION- WHAT WILL IT MEAN?

- Pending OSHRC cases?
- Proposed changes in Subpart V?
- OSHA will surely appeal?
- Will OSHA finally start a rulemaking to change 1910.12(a)?
- Practical impact on jobsite safety – will there be any?

Occupational Safety and Health Review Commission

- Recent OSHRC decisions of note:
 - *United States Postal Service*, 21 BNA OSHC 1767 (2006)
 - *Ruhlin Construction*, 21 BNA OSHC 1779 (2006)
 - Reflective clothing is not personal protective equipment under General Industry or Construction PPE standards
 - OSHA did not appeal to court of appeals – a surprise

Occupational Safety and Health Review Commission

- *Manganas Painting Co., Inc.*, (No. 94-0588, March 23, 2007)
 - Complex decision under interim lead standard; Two holdings of note for utilities:

Under the lead standard, a failure to sweep up lead dust and debris is not a “serious violation” of the housekeeping requirement to keep surfaces “as free as practicable” unless OSHA proves the concentration of lead in the debris; violation is other-than serious; This is potentially significant for arsenic and hex chrome.

Statements about work activities made by employees to Compliance Officers during an investigation are admissible in a citation contest hearing – its not hearsay. This underscores importance of preparing and accompanying supervisors to interviews, especially in serious cases.

The “State” of OSHA

- Several oversight hearings planned or threatened
- What will it all mean?
 - Maybe some additional rulemaking
 - Cranes and derricks
 - No plan to expedite Subpart V or silica
- More heat than light?