WINTER BOARD AND COMMITTEE MEETINGS

The Board of Directors of MICA and committees held their winter meetings on January 24 & 25, 2014, in Scottsdale, Arizona. The committees that met on January 24th were the Merit Shop, Labor, Promotion & Membership, Safety & Environmental, and the Past Presidents’ Planning Committee.

The Merit Shop and Labor committees reviewed the workloads within the MICA region. They discussed business issues that the insulation contractor is dealing with including the looming labor shortage and its impact on businesses.

The Promotion and Membership committee discussed several ways to promote MICA and the insulation industry to the business community. The committee reviewed the list of potential member firms and assigned current committee members to call the potential members to encourage their participation in MICA. The committee discussed several options to help promote the insulation industry and membership in MICA.

The Safety & Environmental committee reviewed the application process for the 9th annual “Safety Best Practices” award. The committee agreed to continue to use the grading process that was implemented two years ago. The committee also agreed to use the application forms that were used last year for the contractor and associate applications. It was noted that the two groups have some unique safety issues that need to be addressed in the application process. Notice of the award application process will be sent to the members in March of this year.

The Past Presidents’ Planning committee met and reviewed MICA’s Vision Statement and Strategic Initiatives. The past presidents are asked to identify and discuss emerging issues facing the insulation industry and the MICA members. As new issues are identified, the past presidents review the vision statement to see if a new strategic initiative needs to be added or existing initiatives removed. No new initiatives were added at this meeting.

The Board of Directors met on Saturday, January 25, 2014. Part of the agenda was to approve the technical programs for the 57th annual spring convention of MICA. This convention will be held June 16 to 19, 2014, at the Eagle Ridge Resort & Spa in Galena, Illinois. The resort is a natural backdrop to the picturesque setting in the 6,800-acre Galena Territory, close to the historic town of Galena, with abundant wildlife and rolling hills that stand out from the normally flat Illinois landscape.

The spring meeting schedule has changed to accommodate those members who wish to be home on Father’s Day. We have moved the convention to begin on Monday, June 16, 2014, instead of on Sunday, Father’s Day. Please note this change and begin now to plan your participation at our 57th annual spring convention.
Hello MICA family!

I recently went to a seminar about charitable giving titled "when to say YES and when to say NO to charitable giving requests." The speaker was a pretty distinguished financial advisor in Wichita and had lots of experience helping business owners wade through the ins and outs of year-end donations and other tax reducing strategies. He didn't focus long on saying yes. For most of us saying yes is the easy part. Saying NO was his focus. How do you say no to the flood of year end donation requests? How do you say no respectfully? How do say no to those charities that you know need your assistance? (This assumes you have already thrown out any requests from Nigerian Princes).

Saying NO is hard! We don't want to let anyone down; our children, our spouse, our customers, or the person asking for money. The truth is saying yes to too many things can hurt your business. Saying yes quickly is the first instinct for those of us who are out there fighting for the next sale, the next contract, or the next big deal. Saying yes enough is going to quickly overwhelm you or your company. It’s going to burn you out, and eventually it’s going to backfire because you can’t possibly keep all the commitments you promised. Saying yes is easy! It's what comes after that can bury you.

Saying NO is hard! Just a few weeks ago a customer of ours decided to employ a third party company to administer all of their POs, documents, invoice submission and payments. Part of the qualification to be submitted to this third party company was to agree to hold their client (who we used to work directly for) harmless in any lawsuit AND pay their legal fees. The way it was worded it applied to any action that occurs whether we were involved or not! So, I had our attorney draft a very small change and submitted the paperwork. Of course, we were denied access and currently do not do any business with them. It was hard to say no to the business that was to come from this, but I'm guessing we'll have fewer headaches down the line.

So when do you say No? Here are seven times you or your company should say no according to Inc. Magazine:

1. Say NO! When No One Is Ready.
2. Say NO! When It's Not a Fit.
3. Say NO! When You're Overloaded.
4. Say NO! When It's Unrealistic.
5. Say NO! When You Have to Go Backwards.
6. Say NO! When It's Unprofitable.
7. Say NO! When You Can't Meet Expectations.

Saying no was (probably still is) a critical part in the success of Apple. The power of saying no is summed up in this month’s quote by Steve Jobs.

“People think focus means saying yes to the thing you’ve got to focus on. But that's not what it means at all. It means saying no to the hundred other good ideas that there are. You have to pick carefully. I'm actually as proud of the things we haven't done as the things I have done. Innovation is saying no to 1,000 things.”

Thank you for reading,

Ben Pfister

President of MICA
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COLD WEATHER INJURIES

The following article is provided by our legal counsel, Mr. Gary Auman. Gary is a partner with the law firm of Dunlevey, Mahan, and Furry in Dayton, Ohio.

Several months ago, I wrote an article about heat stress, and I warned you that OSHA was taking heat stress very seriously. In a memo to all Regional Directors, OSHA has directed that if employers (in the construction industry) did not have a heat stress program in place, they were to be cited for violations of the General Duty Clause. Although a similar memo has not been issued regarding cold weather injuries, the same enforcement action is available to OSHA.

There are several types of cold weather injuries: chilblains, frost nip, trench foot, frostbite and hypothermia. Symptoms of chilblains manifest themselves after you have left a cold environment and have rewarmed yourself. They are itchy, painful reddish or purplish areas of swelling on fingers, toes, the nose and ears. These symptoms may last for several days, but usually leave no permanent damage. The same is true of frost nip, which has symptoms of burning, itching or pain. Frost nip is even less likely to result in any permanent damage than chilblains.

A more serious cold-weather condition is trench foot, which results from having the feet exposed to cold, wet conditions for a long time. Employees whose feet get wet do not have to be exposed to very cold temperatures to develop trench foot (symptoms have been found in people working in temperatures of up to 60°F). Without proper first aid, trench foot can lead to the development of gangrene and possibly the amputation of the affected extremity.

Frostbite is the most serious cold weather injury. With frostbite, the body tissue actually freezes. This condition develops primarily because of decreased blood flow and heat delivery to the extremities. When the affected tissue is rewarmed, death of the tissue frequently occurs. The parts of the body affected are the feet, hands, nose, ears and cheeks. Frostbite can lead to the need to amputate the affected extremity. While this short article is not intended to address first aid for these conditions, you need to be aware that with frostbite the affected extremity should not be rapidly thawed if there is any chance that it will be refrozen.

While not an injury, hypothermia is the most serious cold weather condition. Hypothermia exists when the core body temperature drops below 95°F. The problem

(Continued on page 7)
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with hypothermia is its insidious nature. Frequently, there are none of the symptoms of the other cold weather injuries. When the core body temperature drops, the heart, the nervous system and other organs cannot work properly. When this occurs, there can be complete failure of the heart and respiratory system followed by death. Hypothermia usually results from exposure to cold weather or by immersion in cold water.

As an employer, you need a program to address cold weather injuries with your workforce. You should develop a program to address cold-weather injuries. This program should include steps for prevention of cold-weather injuries, the identification of symptoms and first-aid. Prevention steps include encouraging employees to drink plenty of water and to avoid alcohol, caffeinated drinks and smoking. You should also encourage your employees to maintain their nutrition, eat high calorie snacks, and to have a dry change of clothing available in the job site. Finally, all supervisors should be trained in the recognition of the symptoms of cold weather injuries.

Contractor Liability to OSHA for Subcontractors

Many contractors try to escape responsibility for safety compliance by using “subcontractors” instead of employees. Many administrative agencies are aware of this façade and are taking enforcement steps to address the “subcontractor” issue. The most recent OSHA case addressing this issue is Absolute Roofing & Construction, Inc. v. OSHRC, 6th Circuit, No. 13-4364 (docketed 11/20/13). In Absolute Roofing, a roofing contractor was cited for serious and repeat citations for fall protection violations allegedly committed by a “subcontractor”, Koran Construction, Inc. Absolute Roofing is arguing that any citations should have been issued against Koran. Testimony at the Review Commission hearing by the Compliance Officers who performed the jobsite inspection was that Koran told them that he did not have his own business even though he carried liability and workers’ comp. insurance. He also told them that most of the tools he used belonged to Absolute Roofing. He reversed his testimony at the hearing, but the judge concluded that his “substantial and ongoing work relationship” with Absolute Roofing may have influenced his testimony.

The Judge noted that the two businesses had the same business address and shared an office, had the same owners and managers, that they did the same work and occasionally shared the same employees. (Continued on page 9)
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While there is nothing wrong with using subcontractors, you must be mindful that you need to maintain a true arms-length business relationship with the subcontractor. In a future article, I will comment on the indicia of a legitimate contractor-subcontractor relationship. Meanwhile, Absolute Roofing’s appeal of the Review Commission decision affirming the citations will be briefed and argued to the Sixth Circuit Court of Appeals. I will update you on the Court’s decision when it is issued.

OSHA EXTENDS COMMENT PERIOD ON PROPOSED SILICA RULE TO FEBRUARY 11

WASHINGTON – The U.S. Department of Labor's Occupational Safety and Health Administration is extending the public comment period for the Notice of Proposed Rulemaking on Occupational Exposure to Crystalline Silica for an additional 15 days to Feb. 11, 2014.

In response to concerns raised about possible public confusion due to an error on www.regulations.gov, the federal government's online portal for submitting rulemaking comments, the deadline has been extended from Jan. 27 to Feb. 11 to allow stakeholders additional time to comment on the proposed rule. To submit comments using www.regulations.gov, stakeholders may click on the "COMMENT NOW!" box next to the title "Occupational Exposure to Crystalline Silica; Extension of Comment Period" and follow the instructions on-line for making electronic submissions.

Public hearings on the proposed rule are scheduled to begin on March 18, 2014. Information on the proposed rule is available at www.osha.gov/silica.

OSHA EXTENDS COMMENT PERIOD ON PROPOSED RULE TO IMPROVE TRACKING OF WORKPLACE INJURIES AND ILLNESSES

WASHINGTON – The Occupational Safety and Health Administration today announced that it will extend the comment period to March 8, 2014 on the proposed rule to improve workplace safety and health through improved tracking of workplace injuries and illnesses. The proposed rule would amend recordkeeping regulations to add re-
requirements for the electronic submission of injury and illness information that employers are already required to keep under OSHA's regulations for recording and reporting occupational injuries and illnesses.

The comment period has been extended 30 days in response to a request from the National Association of Home Builders. Comments may be submitted electronically at http://www.regulations.gov, the Federal eRulemaking Portal or by mail or facsimile. See the Federal Register notice for more details.

THE NLRB'S NOTICE POSTING RULE

The National Labor Relations Board (NLRB) has decided not to seek Supreme Court review of two U.S. Court of Appeals decisions invalidating the NLRB's Notice Posting Rule, which would have required most private sector employers to post a notice of employee rights in the workplace.

The NLRB remains committed to ensuring that workers, businesses and labor organizations are informed of their rights and obligations under the National Labor Relations Act. Therefore, the NLRB will continue its national outreach program to educate the American public about the statute.

The U.S. Court of Appeals for the District of Columbia Circuit stated: “It is also without question that the Board is free to post the same message [that is on the poster at issue] on its website.” The workplace poster remains available on the NLRB website. It may be viewed, displayed and disseminated voluntarily. In addition, the NLRB has established a free NLRB mobile app for iPhone and Android users to provide the public with information about the National Labor Relations Act.

Under the National Labor Relations Act, most private sector employees have the right to:

- Organize a union to negotiate with employers concerning wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees’ own choosing for a contract setting wages, benefits, hours, and other working conditions.
- Discuss terms and conditions of employment or union organizing with co-workers or a union.

(Continued on page 11)
• Engage in protected concerted activities with one or more co-workers to improve wages, benefits and other working conditions.

• Choose not to do any of these activities, including joining or remaining a member of a union.

Workers who believe their rights have been violated should contact the NLRB promptly, as there is a six-month statute of limitation. Inquiries regarding possible violations can be made without an employer, union or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. As examples, the NLRB may order (1) an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits; (2) may order a union to adhere to its duty of fair representation; and (3) may order an employer or union to otherwise cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency’s website: www.nlrb.gov.

STATEMENT OF LABOR SECRETARY PEREZ ON DECEMBER EMPLOYMENT NUMBERS

WASHINGTON — Secretary of Labor Thomas E. Perez issued the following statement about the December 2013 Employment Situation report released recently:

"The U.S. economy closed out 2013 by adding 74,000 jobs, bringing the 2013 total to nearly 2.2 million new jobs. With 87,000 new private-sector jobs in December, that makes 8.2 million jobs created by the private sector over the last 46 straight months. The December unemployment rate fell to 6.7 percent.

"The economy continues to recover, but we are clearly not out of the woods. Far too many Americans are still struggling to find jobs and secure a foothold in the middle class. Long-term unemployment in particular remains a persistent challenge, stuck at a staggering high: 3.9 million Americans, representing 37.7 percent of all unemployed workers, have been unemployed for at least 27 weeks."
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**FUTURE MICA MEETING DATES**

57th Annual Spring Convention — June, 16 — 19, 2014, Eagle Ridge Resort, Galena, Illinois. [Please note that the convention will begin on the Monday after Father’s Day. This slight change in the schedule is the direct result of member feedback to the Board].

Fall 2014 Annual Fall Business Meeting — October 22 & 23, 2014, Embassy Suites Downtown, Omaha, NE.

58th Annual Spring Convention — June, 2015, Under Consideration. Send your suggestions to the MICA office.

**MICA MEMBER ADDRESS/INFO. UPDATES**

Be sure to inform the MICA office of any changes or corrections to your listing for either the MICA Directory, e-mail correspondence or mailing address. Even if you update your company listing on the MICA website, please inform the MICA office of the changes. We try to be as current as possible with your help.
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"I've met recently with many of them — hard-working Americans who, despite their most diligent efforts, have just been unable to find work, some for as long as a few years. Their lives are a daily struggle, as they rapidly deplete their savings and face looming foreclosure on their homes. One woman described keeping her thermostat at 58 degrees, wearing a coat and hat around the house, to cut back on heating costs. They are not lazy or complacent; they want nothing more than the dignity of work. But they're caught in a terrifying spiral: the longer you've been out of a job, the harder it is to get a job.

"To give them the immediate relief they so badly need, the first order of business for Congress is to pass an extension of emergency unemployment benefits that expired on Dec. 28 for 1.3 million people. It's the right thing to do to extend a lifeline to fellow Americans down on their luck, and it's the smart thing to do to stimulate the economy.

"But we need to go beyond stopgap measures. The best way to help unemployed Americans is to create jobs and grow the economy at a faster clip. Last month's bipartisan budget deal demonstrated that members of Congress can muster the will to agree on constructive solutions to tough problems. In that same spirit, they must now get to work on the middle-class jobs agenda put forward by President Obama. Let's resolve in the New Year to fix our broken immigration system, invest in education and skills development, rebuild our infrastructure, increase the minimum wage and take other steps to create and expand opportunity for the American people."

CONSTRUCTION SUBCONTRACTORS CELEBRATE HIGHLY-ANTICIPATED TEXAS SUPREME COURT DECISION PREVENTING EROSION OF CGL COVERAGE

ALEXANDRIA, Va. — In a highly anticipated decision, the Supreme Court of Texas agreed with a contractor that its agreement to perform a construction project “in a good and workmanlike manner did not enlarge its obligations and was not an ‘assumption of liability’ within the meaning of the [contractor’s insurance] policy’s contractual liability exclusion.”

Contractors in Texas and across the country were keeping a close eye on the outcome of the case of Ewing Construction Co., Inc. v. Amerisure Insurance Co., in which the Texas Supreme Court was charged with responding to two questions:

1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, ‘assume liability’ for damages arising out of the contractor’s defective work so as to trigger the Contractual Liability Exclusion.

2. If the answer to question one is ‘Yes’ and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for ‘liability that would exist in the absence of contract.’"

In its Jan. 17 opinion, the Texas Supreme Court wrote: “[W]e conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not ‘assume liability’ for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. We answer the first question ‘no’ and, therefore, need not answer the second question.”

In the case, Ewing, the general contractor, was faced with a lawsuit alleging defective construction of a tennis facility for a school district in Corpus Christi. Amerisure, Ewing’s CGL insurer, refused to defend, citing a litany of policy provisions, including the Contractual Liability Exclusion, as purported defenses. Although not directly addressed by the Court, the Contractual Liability Exception to the Your Work Exclusion in the Amerisure policy provided coverage for the defective work performed by Ewing’s subcontractors.

In an amicus brief filed on Dec. 21, 2012, the American Subcontractors Association, ASA of Texas, and other construction industry trade organizations told the Texas Supreme Court that contractors are owed the coverage promised in their CGL policies in either case.

“Applying the Contractual Liability Exclusion to property damage to an insured contractor’s work simply because that property damage may breach its contract has a profoundly negative effect on CGL coverage for the construction industry,” the associations told the court. To
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decide otherwise would be “nothing short of a radical departure from the means by which CGL coverage has traditionally been provided by the insurance industry to contractors.”

The Court relied on its August 2007 opinion in Lamar Homes v. Mid-Continent Casualty, which held that coverages should be determined based on exclusions in the policy. ASA filed a brief in the Lamar Homes case in February 2006.

**STATEMENT BY U.S. SECRETARY OF LABOR THOMAS E. PEREZ ON THE BUREAU OF LABOR STATISTICS’ 2013 UNION MEMBERSHIP REPORT**

WASHINGTON — U.S. Secretary of Labor Thomas E. Perez has issued the following statement regarding the department's Bureau of Labor Statistics report released today on union membership in 2013:

"Today the Bureau of Labor Statistics announced that, in 2013, the unionization rate of employed wage and salary workers was 11.3 percent. Among private-sector employees, the rate was 6.7 percent.

"The data also show that among full-time wage and salary workers, union members have higher median weekly earnings than nonunion workers. The median weekly earnings of union members were $950, compared to $750 for nonunion workers.

"Along with higher wages, other data show that union members have greater access to employment-based benefits, such as health insurance, a retirement savings plan, and sick and vacation leave.

"Workers' ability to form unions and engage in collective bargaining has been a cornerstone of a strong middle class. The decline in union membership over the last few decades has contributed to more working families struggling to get by. When workers have a seat at the table, they are better able to bargain for their fair share of the value they helped create; and that leads to greater economic security and economic mobility for everyone. As our economy continues to recover and we work to create good jobs, we need to ensure workers can lift their voices to raise wages, reduce inequality and help more people climb ladders of opportunity."

(Continued from page 16)
At its October meeting, the Board of Directors of MICA approved MICA’s operating budget for 2014. In its deliberations, the Board voted a zero increase in the annual membership dues for contractor and associate member firms. Advertising rates for 2014 will remain the same as in 2013. The Board is very cognizant of the current state of the economy and wants to keep MICA affordable to all current and prospective members. Annual dues have remained constant for the past two years.

Contractor member annual dues for 2014 are $675.00. The annual dues for associate members is $475.00. The advertising rates have not increased for 2014. Please contact the MICA office for a copy of the 2014 advertising rates. Advertising in the MICA Messenger continues to be an excellent forum to reach the membership on a monthly basis.

The 2014 membership renewal notices have been mailed to the member firms. The advertising contracts were mailed out earlier this month. We are anticipating 100% renewals and look forward to your continued participation in MICA in 2014.

Remember, as a MICA member, you are entitled to the member discount when purchasing the electronic version or hard copy of the manual. Just go to the “members only” portion of the MICA website (www.micainsulation.org) to get your discount code. Using the code, you will get a $25 savings off the hard copy (regular price $125) and $40 off on the electronic version (regular price $195). The annual subscription renewal fee on the electronic version is $50.

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The following article is provided by our legal counsel, Mr. Gary Auman. Gary is a partner with the law firm of Dunlevey, Mahan, and Furry in Dayton, Ohio.

With each article I write, I try to focus on a particular safety issue important to the construction industry. I am going in a slightly different direction with this article. If you will all bear with me, I am going to use the ensuing paragraphs to cover a variety of safety issues from recent court decisions to regulatory agendas. I also plan to discuss contractor/subcontractor issues in safety, the current regulatory agenda, the broadening use of the general duty clause, and other issues related to safety.

When we consider important issues concerning safety, we have to look to the hierarchy of OSHA citations to determine where the average construction industry employer needs to put his resources. While I fully understand that resources need to be expended wherever there is a need to improve an employer’s safety efforts, it is good to look at the top ten to get a feel for the enforcement side of the equation. Out of the overall top ten standards cited in FY 2013, quite a few were in the construction industry standards. They were fall protection at #1 overall; hazard communication at #2 overall; scaffolding at #3 overall; and ladders at #7 overall. Of the remaining standards cited, some overlap into the construction area. These include respiratory protection at #4 overall and powered industrial trucks at #6 overall.

Of interest, fall protection at #1 was cited more than two thousand times more than #2, hazard communications. Within fall protection, the most frequently cited area was in residential construction. This relates to fall protection in wood frame construction and steep sloped roofs. This area was cited more than three thousand times more frequently than the next area involving unprotected sides and edges.

You have all heard me discuss many times concerns we all need to note concerning OSHA discrimination. Employers are prohibited from taking any adverse action against an employee for anything the employee does concerning safety from making a safety complaint to the employer to filing a complaint with OSHA. On December 5, 2013, OSHA made it easier for your employees to file retaliation claims against their employer. On that date, OSHA created a website to enable employees to file retaliation complaints online, without having to go to an agency office. This website enables e-filing, not only for OSHA retaliation, but also for the other 21 statutes/agencies for which OSHA processes and investigates retaliation complaints.

From a regulatory agenda standpoint, OSHA released its most recent regulatory agenda much closer to on schedule than it has in the past. The agency announced that formal procedures for handling employee retaliation claims and a rule for walking and working surfaces and personal fall arrest systems are in the final rule stage. New standards on crystalline silica, improved methods for tracking workplace injuries, the injury and illness prevention program standard, amendments to the crane and derricks in construction standard, operator certification in the construction cranes and derricks standard and an update of the national consensus standards for eye and face protection are in the proposed rule stage.

In the pre-rule stage, we find blood borne pathogens; preventing back-over injuries and fatalities; and scaffolds, ladders and other working surfaces. The preceding lists only include those standards that would have an impact on contractors in the construction industry. While Dr. Michaels and others have chafed over the long time it takes to get a new regulation from the initial idea to a final rule, nothing obvious has been done to speed up the process. So, as of this writing it is still taking from eight to ten years to accomplish the rule making process.

The General Duty Clause is part of the Occupational Safety and Health Act. In other words, it is part of an Act of Congress, signed by the President and not a regulation promulgated and adopted under that legislation. The General Duty Clause requires every employer to provide its employees with a place of employment that is free of recognized hazards that are causing or likely to cause death or serious physical harm. I often call the General Duty Clause OSHA’s catch-all standard. The General Duty Clause may only be used by OSHA when there is no standard that governs the observed unacceptable activity of an employer. It may not be used as a substitute for specific rule making. For example, if OSHA observes an employer using a forklift in a manner that OSHA does not consider to be safe, but the method used by the employer is not covered by the specific standard on powered industrial trucks, OSHA would be barred from using the General Duty Clause to cite the employer because it (OSHA) should have anticipated that use and regulated it when it promulgated the standard. But, OSHA is contemplating an assault on this restriction on the use of the General Duty Clause.

(Continued on page 26)
The action by OSHA is addressing a chemical exposure issue, but it could be just the tip of the iceberg, if OSHA gets away with it. OSHA has cited an employer on a chemical exposure where the employer was in compliance with the permitted exposure level of 100 ppm in the specific standard, but had exceeded the exposure level of 50 ppm recommended by the National Institute for Occupational Safety and Health (NIOSH). Obviously, if OSHA gets away with this deviation from enforcing a specific standard in this case, a precedent dangerous to all employers in all areas will be set.

OSHA has always been treated as a “notice” requirement. Employers are presumed to be on notice of what is contained within specific OSHA standards. A NIOSH recommendation is not a properly adopted standard and therefore has no force of law. OSHA is trying to argue that the fact that NIOSH has a recommendation below that which is permissible by OSHA establishes a recognized hazard. OSHA is taking this approach because it has been unable to move new standards forward to final rules to replace what it considers outdated exposure standards. If permitted to take this approach, OSHA will only be a small step from taking the same approach with all safety and health standards using advances made by other safety organizations, including NIOSH.

I bring this to your intention for this purpose because if OSHA’s approach is confirmed by the Review Commission and then by the courts, all employers will have to take an entirely new approach to safety and health compliance.

Finally, I want to discuss a recent case decided by Judge Ken Welsch of the Occupational Safety and Health Review Commission. Judge Welsch addresses three interesting issues that often confront small contractors. Judge Welsch addressed the issues of OSHA’s coverage of temporary workers, whether a citation can issue if workers were on work break at the time of the inspection, and whether it is harassment for OSHA to conduct a complaint inspection if the complaint was made by a competitor. The case is Secretary of Labor vs. Stevers Roof Side Remodel, LTD, 2013 OSAHRC LEXIS 91.

Evidence presented at the hearing was that the company employed one person, the owner and hired temporary employees to perform the labor on the job. These temporary employees were supervised by the owner of the company. Apparently, the owner of the company, Mr. Stevers, testified that he directed the location of where the temps were to work, the time they were to work, and the overall objectives to be accomplished. The judge concluded that Mr. Stevers supervised the employees since he was generally present on the project to ensure the work was performed in accordance with the owner’s requirements. Stevers also monitored the temp’s daily progress to assure that it was done safely and on schedule. He even prevented the compliance officer from speaking to the workers. The truck and equipment on the project were the property of Roof Side and were provided to the workers to use. This included personal fall arrest systems, ladders, pick boards and slide guards. Based on the preceding, Judge Welsch concluded that the workers were not independent contractors. The judge pointed out that one of the workers even identified himself as the foreman when the compliance officer arrived on the jobsite.

As to the issue of whether a citation could issue for exposures to fall hazards while the workers were on break, the judge again found for OSHA. The key to this part of the case is for all employers to remember that you have responsibility for the safety of your employees at all times on the jobsite. Judge Welsch felt the same way. He pointed out that under current case law “employees are considered ‘in the zone of danger’ either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress or egress form their assigned workplaces.”

Finally, on the issue of harassment the judge again ruled for OSHA. He stated that while he was sympathetic to the employer’s concerns about competitor complaints, it cannot be disputed that an unsafe condition which needed to be ablated existed and was observed by the compliance officer when he arrived at the jobsite.

While this decision involved a residential roofing contractor, it has application to anyone in the construction industry. Our takeaways from this are straightforward: first, you need to accept the fact that you are responsible for the safety of your employees at ALL times they are on your jobsite. The only possible exception to this is if they engage in unpreventable employee misconduct or deviate from their work related activities without your knowledge; second, if you have any control over those working on a job for you they will be considered your employees and not independent contractors; and finally, it is not going to matter how OSHA gets to your jobsite, it is what is observed by them after they are there that is important.
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