**OSHA UPDATE**

**Electronic Filing**

In May we reported a change by the Occupational Safety and Health Review Commission (OSHRC) concerning the electronic filing on Notices of Contest. The notice from the OSHRC made it appear that all Notices of Contest filed after June 10, 2019 would have to be filed electronically if the employer or the employer’s representative had already established itself under the electronic filing procedures of the OSHRC. At first I hesitated to bring this to our members attention because in the forty plus years I have been counseling and representing employers in OSHA and workplace safety matters it has been clear that the OSHRC does not have jurisdiction of a case until after the Notice of Contest has been filed. But, so as to be sure that ourl members and my other clients made timely filings of their Notices of Contest, I advised that they continue to mail the Notice of Contest (NOC) to the Area Director who issued the citations but also electronically file the NOC with the OSHRC, if they had established an electronic filing profile with the OSHRC. In this way the employer would make sure it effectively filed its NOC. Recently, after more digging, we have determined that the NOC does not have to be electronically filed with the OSHRC to be effective, As I felt at the outset, the OSHRC does not get jurisdiction of an NOC until after the Area Director has forwarded the NOC to the Solicitor for the Department of Labor and the OSHRC. So, we can all go back to the past practice we employed to file an NOC. Electronic filing will come into play now on all contested cases. The OSHRC will no longer as if the parties agree to electronic filing as a case moves forward; it is now required.

**Safety Enforcement**

As any of you who have heard me speak on safety and OSHA compliance have heard me say, enforcement of your safety rules is essential to demonstrating that you have an effective safety culture and that safety is a cornerstone of your business. I have repeated these same comments to those of you who have participated in our safety recognition program. As I continue to get involved in one way or another with the defense of OSHA citations received by my clients I am finding that many of you are still giving “lip service” to safety enforcement. While you continue to takje a very “soft approach to safety enforcement OSHA is stepping up it enforcement activities and increase the amount of the fines and penalties they are levying against companies for safety and health violations. Recently Fuyao, an auto glass manufacturer in my own backyard, Dayton, Ohio was fined $724,389 for “exposing employees to multiple safety and health hazards. That is bad enough and there were reasons for the number of citations and the amount of the fines. But, having said that the Acting Regional Director of OSHA’S Region V which is headquartered in Chicago drilled in on the responsibility of employers to make sure their employees understand ALL safety rules and comply with them. Bill Donovan, the Acting Regional Administrator stated that “This company’s repeated *failure to implement and enforce safety and health programs at the workplace is unacceptable*. Employers *must continually* evaluate their facilities for hazards, and train employees and managers to use proper safety controls and equipment to keep their worksites safe and healthful.” (emphasis added) When you couple this with the language used by OSHA on October 11, 2018 when it slightly relaxed the existing prohibitions against mandatory post-accident drug testing and rate based incentive programs you can clearly see that OSHA believes a strong safety culture with an employer is evidenced by effective training and consistent and objective enforcement of safety rules. I think Mr. Donovan’s comments send a clear message to employers in Region V that OSHA will be looking at training and safety enforcement when it considers how to effectively deal with an employer following an inspection during which safety compliance violations were noted.

Having said all I did in the preceding paragraph I want to remind you that my comments in this article and others I have written and will write in the future are focused on employee safety, not on avoiding citations and/or keeping fines and penalties low. However, having an effective enforcement program in your company is essential to defeating citations based on unpreventable employee misconduct and demonstrating your commitment to safety to regulatory authorities. Having interviewed many employees in various industries in the past forty plus years, I can assure you that if you only orient your employees on your safety rules when they are hired and perform weekly toolbox talks and nothing more you could randomly select twenty-five percent of your employees on any job site and interview them and, in most cases, fewer than fifty percent of them would be able to correctly respond to ten questions about your safety program and rules. I am pretty sure that with many if not most of you if I were to take a look at your safety enforcement program (presuming you have one) I would find inconsistent enforcement, at best. Remember to be complete your enforcement program must contain retraining along with any disciplinary action.

**Regulatory Activity**

I have two items to report concerning regulatory activity. First, H.R. 3668 has been introduced in the House by Representative Judy Chu of California. This bill is titled the Asuncion Valdivia Heat Stress and Fatality Prevention Act fo 2019. The bill m if it becomes law will require OSHA to promulgate a final rule within two years of the Bill’s enactment. The Bill would require employers to develop procedures and methods for initial and regular monitoring of employee exposure to assess whether they are exposed to excessive heat. Beyond thie the Bill has requirements that mirror the 2012 NIOSH criteria document on heat illness prevention, although it does provide a requirement for hazard prevention, including engineering controls, administrative controls or PPE. The Bill is named after a California farm, worker who died from heat stroke in 2004. As I have advised in the past, it was only going to be a matter of time before OSHA would move to promulgate a rule to address the heat stress issue. Apparently, OSHA was not moving fast enough for Congress. In addition to the 130 organization which have signed on to a petition to OSHA to move on this issue, climate change has also be drawn into the mix. While I hesitate to predict what will happen to this bill, heat illness is topic with a high level of interest. The bill sends a message that at least one member of Congress does not feel that OSHA is moving quickly enough to address this problem. So, i think we can assume that the issue is now going to move forward, either at the Congressional level or through OSHA rule making.

Finally, on July 29th OSHA submitted a draft notice of a Request For Information (RFI) preparatory to the Office of Management and the Budget (OMB). The RFI when it is published in the Federal Register will seek information regarding tasks and tools that are listed in Table I of the current Respirable Crystalline Silica Standard. The goal is to provide additional common construction industry tasks with corresponding dust control methods to ease some of the burden on the construction industry in addressing this material. Stay tuned for more information as it becomes available.