

Executive Safety Update

The Monthly News Bulletin of the Construction Safety Center

Vol. 17, Issue 7 – January 2010

Safety Council Announces 20th Year for Annual Construction Safety Conference & Expo! February 16 - 18, 2010

The Construction Safety Council will be hosting its 20th Annual Construction Safety Conference next month. The conference will be held on February 16 - 18, 2010 at the Donald E. Stephens Convention Center. This is the largest construction-specific safety conference held in the US.

To commemorate the Construction Safety Council's 20th Anniversary, an awards banquet will be introduced at the Conference & Expo on February 17th during lunch. The program is designed to recognize outstanding efforts in construction safety and health and proactive contractors who put training their employees as the number one priority. Construction Safety Center Awards include those for outstanding training efforts, a hero and survivor award for a life saved after training received, and a Raising the Bar award sponsored by Construction Risk Management. Other awards will include the Robert M. Farrell Award given out by the Construction Safety Association, the John Maronic Memorial Federal Safety and Health Professional Award and an induction of an individual to the Safety and Health Hall of Fame. Also, several scholarships will be given out to students enrolled in construction safety programs. You are encouraged to visit our website at www.buildsafe.org to purchase tickets for the awards banquet.

We are also pleased to announce that Dr. John Howard, director of the National Institute for Occupational Safety and Health will deliver the keynote address on Tuesday, February 16. John Howard, M.D., M.P.H., J.D., LL.M, is the Director of the National Institute for Occupational Safety and Health in the U.S. Department of Health and Human Services. Dr. Howard also serves as the Coordinator of the Department's World Trade Center Health Programs.

The conference brings together a diverse audience, including construction owners/users, contractors, researchers, government officials, safety and health professionals, unions, and workers to share information and ideas about effective safety and health interventions and how to move best practices from inception to practical implementation. Over 60 sessions will be offered throughout the three days. There will be some old favorites, such as sessions on fall protection, power line safety and workers' compensation issues. Additionally, sessions on electrical safety, industrial hygiene issues and work zone safety will be presented to give a full range of sessions to choose from! In addition, over 80 exhibitors will be on hand to demonstrate the latest innovations in safety and health products and services. The exhibits will be open the first two days of the conference (February 16 & 17).

The conference kicks off on Tuesday, February 16 at 7:30 am. A significant discount is currently being offered for those who register online. The conference is a terrific value - prices include registration materials, continental breakfast, lunch, entrance to Safety Expo '10 for two days, and more!

Visit our website at www.buildsafe.org for a complete agenda and to register now! If you would like more information, please contact us at 800-552-7744.

Executive Safety Update
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Executive Safety Update is published monthly by the
Construction Safety Center
4100 Madison St | Hillside, IL 60162 | www.buildsafe.org | 708-544-2082

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OSHA COMPLIANCE – CREATING LEGAL PRIVILEGES FOR COMPANY INVESTIGATIONS AND AUDITS

By Mark A. Lies II and Elizabeth L. Ash

I. INTRODUCTION

With the recent appointment of David Michaels as the new head of OSHA, the Obama Administration has affirmed its commitment to workplace safety, with an increased focus on industrial hygiene. Dr. Michaels' appointment signals a more aggressive OSHA, with an active enforcement agenda as part of a "bold campaign to change the workplace culture of safety." As OSHA implements its agenda, employers should proactively develop procedures for responding to OSHA inspections, including preemptively assessing their liability through audits. This article outlines recommendations for developing those procedures in a way that affords employers protection for sensitive information that is developed and analyzed by ensuring that available evidentiary privileges, particularly the work product privilege, are created and preserved to the greatest extent allowed by law.

II. OVERVIEW OF LEGAL PRIVILEGES

When OSHA issues a citation that the employer contests, the citation becomes a contested proceeding before the Occupational Safety and Health Review Commission, which is the adjudicatory arm of OSHA. While the rules of procedure before the Review Commission are somewhat relaxed compared to the federal courts, the Review Commission does follow, generally, the Federal Rules of Civil Procedure. As in any litigation, both OSHA and the employer (and, where it has elected to participate as a party in the proceeding, the union) have the ability to obtain relevant documents and information through discovery.

Under the Federal Rules of Civil Procedure, all documents and information that is reasonably calculated to lead to the discovery of admissible information are discoverable. However, the Rules recognize an important exception. "A party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation for trial by or for another party or by or for that other party's representative . . . **only** upon a showing that the party seeking discovery has a substantial need of the materials in preparation of the party's case . . ." Fed. R. Civ. Pro. 26(b)(3) (emphasis added). Thus, Rule 26 implicitly recognizes that materials prepared by or at the direction of a party's representative (i.e., legal counsel) in anticipation of litigation are protected from discovery unless the party seeking discovery can show an exceptional need for those materials.

While many have characterized this evidentiary privilege as the "attorney work product doctrine;" however, the protection is not limited to materials prepared by an attorney. Rather, the privilege extends to materials prepared by any person at the direction of an attorney, as long as the materials are prepared "in anticipation of litigation."

The Review Commission has recognized the validity of the work product privilege in contested OSHA proceedings. See *Sec. of Labor v. Bally's Park Place Hotel & Casino*, 15 O.S.H. Cas. (BNA) 1337 (Rev. Comm'n Nov. 7, 1991), *aff'd Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252 (3rd Cir. 1993). In *Bally's Park Place*, the employer refused to release to the union a report containing the results of iodine emissions testing for a particular piece of machinery that has caused employee health

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complaints. The employer's position was that the report had been ordered by the company's General Counsel after the company received a letter from OSHA listing numerous complaints about the machine. The employer asserted that the report had been prepared at the direction of the in-house attorney because the company anticipated litigation potentially arising out of OSHA's complaint letter and the report was developed in order to allow the in-house the ability to advise the employer on its potential legal liability.

OSHA then cited the employer for a willful citation for violating 29 C.F.R. 1910.1020 for failing to release exposure records to an authorized employee representative. The Administrative Law Judge affirmed the citations, but the Review Commission reversed and vacated the citations. The Review Commission held that the emissions report qualified for protection from disclosure because it had been prepared in anticipation of litigation at the direction of the employer's attorney by the company's consultant or agent. On appeal, the Third Circuit agreed that the report was protected from disclosure.

The Review Commission has also held that the work product protection can apply to post-accident investigative reports prepared in the aftermath of an incident such as an explosion or a fatal accident. In *Sec. of Labor v. Continental Oil Co.* for example, the Review Commission held that the employer was not required to give OSHA reports prepared by the company's expert consultants hired by the company's attorneys to investigate a refinery explosion. 9 O.S.H. Cas. (BNA) 1737 (Rev. Comm'n Apr. 27, 1981). The Review Commission found that the employer's attorneys hired a team of experts to investigate the cause of the explosion and to report their findings directly to the company's attorneys. Importantly, the Review Commission acknowledged that the work product privilege is "broad enough to encompass the work of persons who are not attorneys." In addition, the Review Commission held that the reports were prepared "in anticipation of litigation" even though no litigation had been initiated. The Review Commission recognized that materials need not be prepared for any specific litigation, but only "with an eye toward litigation" in order to qualify for the evidentiary privilege.

III. RECOMMENDATIONS

The *Bally's Park Place* and *Continental Oil* cases illustrate how important it is for employers to have procedures in place to ensure that sensitive documents and materials (such as post-accident investigation reports and internal self-audits or analyses) are protected from disclosure to OSHA. If not protected, these reports can become "smoking gun" documents containing potential admissions of liability that may be used by OSHA to support issuance of citations, including willful citations, resulting in significant monetary penalties and negative visibility for the employer.

It is recommended that employers establish procedures to create and preserve evidentiary privileges as follows:

- Ensure that Company personnel at all locations are trained and required to contact in-house or outside counsel as soon as an OSHA inspector arrives at the location. The attorney should be involved throughout the inspection, including participating in interviews of management personnel and opening/closing conferences. If the attorney cannot participate in any part of the inspection, the attorney should designate a management representative to act on the attorney's behalf by taking notes, photographs, or otherwise documenting the progress of the inspection.
- Ensure that personnel at company locations contact in-house or outside counsel in the event of an investigation into a workplace fatality or accident. The attorney should be

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engaged to direct the investigation, including any “root cause” investigation or report, as well as the decision to retain an independent expert consultant.

- Keep the in-house or outside attorney apprised of important developments by copying the attorney on email and other correspondence and asking the attorney to participate in telephone conferences and meetings.
- Ensure that memoranda, emails, letters, or other communications that contain legal advice are not distributed beyond company representatives involved in critical decision-making. Generally speaking, disclosing communications with an attorney to a party outside the company, or outside of those company representatives who are considered to be in the employer’s “control group” by reason of their decision making authority, will result in a waiver of a claim of attorney-client confidentiality.
- Engage an in-house or outside attorney whenever the employer desires to conduct an internal safety or health self-audit to assess potential safety or health hazards. The attorney will be able to engage an outside safety expert to conduct the audit at the attorney’s direction.

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OSHA announces 'OSHA Listens' public meeting to solicit comments and suggestions from stakeholders

Public meeting scheduled for Feb. 10 in Washington, D.C.

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) today announced a public meeting, "OSHA Listens," to solicit comments and suggestions from OSHA stakeholders on key issues facing the agency. The meeting is scheduled for Feb. 10 from 9 a.m. to 5 p.m. EST in Washington, D.C.

"Public involvement in the government's activities is a priority for this administration and is important to enhancing OSHA efforts to protect the safety and health of workers," said Assistant Secretary of Labor for OSHA Dr. David Michaels. "This public meeting gives us an opportunity to hear your ideas, suggestions and comments on key issues facing this agency."

Some of the questions OSHA invites public input on include:

- What can the agency do to enhance and encourage the efforts of employers, workers and unions to identify and address workplace hazards?
- What are the most important emerging or unaddressed health and safety issues in the workplace, and what can OSHA do to address these?
- How can the agency improve its efforts to engage stakeholders in programs and initiatives?
- Are there additional measures to improve the effectiveness of the agency's current compliance assistance efforts and the onsite consultation program to ensure small businesses have the information needed to provide safe workplaces?
- What specific actions can the agency take to enhance the voice of workers in the workplace, particularly workers who are hard to reach, who do not have ready access to information about hazards or their rights, or who are afraid to exercise their rights?

The public meeting will be held at the Frances Perkins Building auditorium, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, D.C. To attend and/or make an oral presentation, individuals must register by e-mail at stakeholder.meeting@dol.gov by close of business on Feb. 3. In the e-mail, include:

- Your name, title, company or organization (if applicable), address, telephone number and e-mail address.
- If you wish to make a short presentation, the specific topic or issue to be addressed.

Those unable to attend may send written comments to OSHA Docket Office, Docket Number OSHA-2010-0004, Technical Data Center, Room N-2625, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, or submit them via e-mail to stakeholder.meeting@dol.gov. Identify all comments with the docket number.

For more information on the scope of the meeting, attending the meeting or providing written comments, refer to the *Federal Register* notice at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=21302.

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Under the Occupational Safety and Health Act of 1970, OSHA's role is to promote safe and healthful working conditions for America's working men and women by setting and enforcing standards, and providing training, outreach and education. For more information, visit <http://www.osha.gov>.

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DOL/OSHA Schedules Conference on Latino Worker Safety and Health

Following a Labor Day announcement from Secretary Hilda Solis, the Occupational Safety and Health Administration will convene a National Action Summit for Latino Worker Health and Safety, April 14-15 at the Hilton Americas Hotel in Houston. The conference is co-sponsored by the National Institute for Occupational Safety and Health.

The conference will bring together workers and representatives from employer associations, labor unions, the faith community, community organizations, the medical community, safety and health professionals, educators, government officials, Consulates, the entertainment community and other non-traditional partners.

Construction will be the primary industry targeted. Latino immigrant workers comprise almost one quarter of the construction industry workforce and suffer the highest rate of construction-related deaths. The conference will also target other high-risk industries that employ large numbers of Latino workers.

"Far too many Latino workers have needlessly lost their lives just trying to earn a living and it must stop," said Assistant Secretary of Labor for OSHA David Michaels. "At the summit, we will shine a spotlight on the hazards and challenges faced by this vulnerable sector of the nation's workforce so that we can begin crafting new, badly needed strategies to prevent thousands of injuries and deaths every year."

The conference will also showcase innovative partnerships, demonstrate successful education and training strategies, and develop effective enforcement and communication strategies. Those interested in attending can register online at www.osha.gov beginning Wednesday, January 13.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing a safe and healthful workplace for their employees. OSHA's role is to assure safe and healthful working conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit <http://www.osha.gov>.