

**OSHA/CONSTRUCTION**

U.S. Department of Labor's OSHA cites 2 Denver-based companies for violations of Occupational Safety and Health Act

Combined penalties total more than \$140,000 for unsafe trenches at worksites

ENGLEWOOD, Colo. -- The U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) Englewood Area Office has cited two Denver-based companies with penalties of \$75,000 and \$67,000 respectively for violations of the Occupational Safety and Health Act related to unsafe working conditions in trenches.

OSHA's investigation disclosed one alleged willful violation and one alleged serious violation following an inspection at a worksite in Centennial, Colo. The investigation of the second company also found one alleged willful violation and one alleged serious violation related to an unsafe trench at a Parker, CO worksite.

"Different companies. Different worksites. Similar issues. Trench work can be extremely dangerous," said Greg Baxter, OSHA's regional

Administrator in Denver. "Companies need to take the necessary steps to address hazards ahead of time and to educate employees on safe trench operations."

For both companies, the alleged willful violations stem from a lack of protective systems required for trench operations. OSHA issues a willful citation when an employer exhibits plain indifference to or intentional disregard for employee safety and health.

The alleged serious violation against Company A relates to work materials being too close to the edge of the trench. For Company B, the alleged serious violation relates to the company failing to conduct a proper trench inspection. OSHA issues a serious citation when death or serious physical harm is likely to result from a hazard about which an employer knew or should have known.

Both companies have 15 business days from receipt of the citations to comply, request an informal conference with OSHA's area director in Englewood, or contest the findings before the independent Occupational Safety and Health Review Commission.

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>.

Get Ready for OSHA Reform

Congress recently reintroduced legislation which, if enacted, will drastically expand coverage, enhance whistleblower protections and increase civil penalties and criminal sanctions under the Occupational Safety and Health Act. The Protecting America's Workers Act of 2009 (S.1580, H.R. 2067) was introduced by the late Senator Edward Kennedy (D-Mass.) and Representative Lynn Woolsey (D-Calif.) and is awaiting consideration by Senate and House committees.

The Act would:

- Expand coverage of the OSH Act to all federal, state and some local workers. Except in certain "state plan" states, public employees are currently exempt from OSHA.
- Expand OSHA's whistleblower protection by codifying an employee's right to make safety complaints or refuse to do hazardous work. When a whistleblower claim is successful, OSHA would have the power to immediately order reinstatement, back pay, compensatory damages and the employee's attorneys' fees and costs.
- Prohibit employers from discouraging employees from reporting work-related injuries or illnesses, or discriminating against employees who do.
- require employers to pay employees for all time spent participating in or "aiding in" an OSHA inspection.
- Require OSHA to investigate all accidents resulting in the death of an employee or the hospitalization of two or more employees.
- Grant substantial new "Victim's Rights" to employees who sustain a work-related injury or illness subject to an OSHA inspection or to the employee's family members where the employee died or is unable to assert his or her rights. Victims or their representatives would be afforded the right to participate in OSHA's inspection, receive certain information and object to settlement agreements between OSHA and the employer.
- Allow employees and unions to object to and even contest settlements between OSHA and employers that withdraw or modify citations.
- Increase the maximum penalties for "Repeat" or "Willful" violations from \$70,000 to \$120,000. Repeat or willful violations resulting in the death of an employee could be assessed as high as \$250,000. Maximum penalties for Serious and "Other-than-serious" violations would be increased from \$7,000 to \$12,000, with penalties up to \$50,000 for Serious or Other-than-serious violations causing death. OSHA will be required to adjust penalties for inflation every four years.
- Expand OSHA's criminal liability provisions to make willful violations causing death or "serious bodily injury" a felony subject to substantial fines and imprisonment under the U.S. Criminal Code. In addition to corporate employers, "responsible corporate officers" would be individually liable for criminal violations of the OSHA Act.

The Protecting America's Workers Act of 2009 is more onerous than similar legislation introduced last year and is yet another sign of the Obama Administration's intent to take a much tougher stance on OSHA enforcement (See "[OSHA Back in the Enforcement Business](#)"). Although passage of the proposed legislation is uncertain at this time, there is no question that the Act, if passed, will significantly impact public and private employers. Employers and employer groups are urged to monitor its progress.

More Safety Inspections to be comprehensive; not focused on single hazard

Now, if OSHA decides to come to your facility to perform an inspection, it's much more likely to be comprehensive instead of one just focused on a single problem. OSHA has issued a directive that cancels focused inspections for general industry for now. Focused inspections will continue in the construction and maritime industries.

The agency is in the process of considering a new Annual Operating Plan that will change the General Industry Inspection protocol. OSHA developed guidelines for its inspectors to conduct focused inspections in the construction

and maritime industries in 1994 and 1998, respectively. The agency says focused inspections allow it to use its resources more efficiently.

Focused inspections primarily address the predominant hazards of the industry. Comprehensive inspections look at a wide range of potential hazards.

In 2008, focused inspections were extended to general industry. Click [here](#) for information on focused inspections for the construction industry.

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www.OSHA.gov
www.MSHA.gov
www.Safetynewsalert.com
www.cvsa.org
www.kelleronline.com
Sherman & Howard

DOT “Direct Observation” mandatory for “Follow-Up” drug testing

If a driver has passed a drug test and has been placed out of service, taking clean urine held in a device into a drug testing site is not going to be an option anymore.

Beginning Aug. 31 the Department of Transportation's Direct Observation collection procedures will be mandatory for all return-to-duty and follow-up drug testing as a tool to combat attempts by employees to cheat on drug tests. It allows the observer to check the individual for prosthetic or other cheating devices.

The U.S. Court of Appeals for the D.C. Circuit lifted the previous stay on July 1, following the Court's unanimous decision to uphold the DOT's position in this matter. The language of 49 CFR 40.67(b) now reverts back to the version that became a final rule on June 25, 2008, which reads as follows:

§ 40.67 When and how is a directly observed collection conducted?

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

The recent announcement also states that the DOT is aware that some employers and labor organizations may have entered into collective bargaining agreements (CBA) that prohibit or limit the use of direct observation collections in return-to-duty and follow-up testing situations.

Employers and employees, of course, do not have the authority to agree to avoid compliance with the requirements of federal law. When this final rule goes into effect, conducting all follow up and return-to-duty testing using direct observation collections will be a requirement of federal law. Employers must use direct observation collections for such tests that take place after the effective date of this rule and any contrary provisions of CBA in the present or in the future will be not be effective.

While many tried to stop direct observation, citing privacy laws, amongst other things, those attempts were not successful.

The Court carefully considered whether the department's final rule struck with appropriate Fourth Amendment balancing of the needs of transportation safety with the reasonableness of the search, the Federal Register document stated. The Court stated that the Department's interest in transportation safety is compelling to say the least. Further, the Court recognized that given the proliferation of cheating devices, we have little difficulty concluding that direct observation furthers the government's interest in effective drug testing.

Since employees' returning-to-duty can anticipate that they will be subject to more frequent testing, armed with such foreknowledge, returning employees can easily obtain and conceal cheating devices, keeping them handy even for unannounced follow-up tests. The Court concluded that the Department has a strong interest in conducting direct observation testing to ensure transportation safety.

On May 15, the Court unanimously upheld DOT's direct observation drug testing rules applicable to return-to-duty, safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test.

In conclusion:

1. The final rule makes direct observation collection procedures mandatory for all return-to-duty and follow-up drug testing.
2. This provision had been stayed by the Court; but that stay was lifted July 1 following the Courts unanimous decision to uphold DOT's position in this matter.
3. This amendment, therefore, restores the language of 49 CFR 40.67(b) to the version that became a final rule July 25, 2008, and
4. The final rule is effective Aug. 31.

Lessons Learned from Highway Crashes

NTSB WARNS FATIGUE CONTINUES TO BE A SERIOUS SAFETY PROBLEM FOR MOTOR CARRIERS



Recent motor carrier accidents investigated by the National Transportation Safety Board (NTSB) continue to uncover operator fatigue as a major safety risk prompting the agency's Acting Chairman to again call for action. "The government has spent millions of federal dollars researching this insidious human condition in all modes of transportation, but too little progress has been made because the solution requires a fundamental change in habits and culture," said NTSB Acting Chairman Mark V. Rosenker. "It's time to realize that combating fatigue is a shared responsibility of government, industry, and employees." "The facts are clear," he said. "Operator fatigue is one of the most widespread safety issues in the transportation industry, and presents an unnecessary risk to the traveling public.

Often a company's culture or policies can produce an

environment where fatigue is considered to be just part of the job."

"Motor carrier operators need to be aware that limited sleep can degrade

alertness, vigilance, and judgment; mar performance, and impair information processing," he said. "It can also increase reaction time, and elevate the probability of errors."

The NTSB is urging the FMCSA to develop and implement a plan to deploy technologies to reduce fatigue-related accidents and to continually assess the effectiveness of the fatigue management plans implemented by motor carriers, including their ability to improve sleep and alertness, mitigate performance errors, and prevent incidents and accidents.

Fatigue is not a new issue for the NTSB. It has been an issue of great concern for more than a quarter of a century. The NTSB has investigated over 50 fatigue-related accidents in all modes of transportation and has addressed this problem

through accident investigations, safety studies, and safety recommendations. Operator fatigue has been on the NTSB's Most Wanted List of Transportation Safety Improvements since the list's inception in 1990. NTSB investigations have shown that steps can be taken to prevent fatigue related accidents.

- Employees can each take responsibility to adjust their personal schedules and allow for 8 hours of continuous sleep, preferably at night.
- Employers can establish schedules that provide employees with enough off-duty time to allow them to obtain eight hours of sleep, and avoid schedules that result in irregular or unpredictable work-rest cycles.
- Both employees and employers can learn more about the risks posed by sleep disorders, the indicators and symptoms of such disorders, and the available means of detecting and treating them.

NIOSH develops new software to Analyze and Reduce Noise Exposure in Mines



A new software product was developed by the National Institute for Occupational Safety and Health (NIOSH) for use by mine management and safety personnel to reduce noise exposure. The software called "Determination of Sound Exposures (DOSES)" simplifies the recordkeeping and analysis associated with time-motion studies and worker noise exposures, making it easier to identify and solve noise problems.

The software relies on a time-motion study that profiles a worker's daily activities while noise measurements are collected with a dosimeter or sound level meter (SLM). Observations about the worker's location and tasks or other activities are recorded along with times and durations so they can later be matched up with the noise data.

After the completion of the time-motion study, the information is entered into DOSES. The program then displays information about the worker's accumulated noise dose over time.

For more information, visit <http://www.cdc.gov/niosh/mining/products/product162.htm>

MSHA Accident Prevention Program Safety Idea AGING WORKFORCE CONSIDERATIONS

The age of our nation's miners is increasing – half of them are over 45 years of age, compared to 41 years of age in 1998. In 2008, 10 fatalities occurred where the victim was over 60. The oldest victim was 81 years of age. Implementing the following suggestions would not only help experienced workers, but would benefit all workers:

- Never assume an employee with extensive experience is knowledgeable in the task that they are being assigned.
- Improve illumination and add bright color contrast to the workplace by painting guarding yellow or red, using bright red stop switches, and bright green start switches for electrical controls, etc.
- Increase task rotation to reduce complacency and the adverse effects of repetitive motion.
- Organize the work area to avoid the need to lift or reach above the shoulders or below the knees.
- Have supplies packaged in lighter units e.g. 40 pound bags instead of 80 pound bags.
- Encourage workers to obtain assistance when lifting heavy items.
- Repair uneven floors, and install skid resistant material, especially for stair treads – install shallow angle stairways instead of ladders.
- Use redundant alarm systems that use flashing lights, audible alarms and/or vibration, and eliminate or reduce background noise.
- Signs that are posted should have large-letter type to improve readability. For more detailed training information, NIOSH has recently published IC9505; titled "Age Awareness Training for Miners".

Download this document by clicking the following link:

http://www.msha.gov/Accident_Prevention/ideas/2008-133.pdf

SAFE BACKING FOR DRIVERS

Backing up a vehicle is a basic function of driving. Backing up seems like a simple operation which would hardly present many hazards, **yet drivers frequently cause vehicle and property damage, injuries, and even fatalities** by performing this task **improperly**.

Following **are guidelines for backing up** a vehicle or piece of equipment **safely**:

- When backing a vehicle **do not solely rely on the mirrors for guidance**. **Turn around and look where you are going**.
- **If your view to the rear is at all obstructed**, before backing up, **place the vehicle in park or neutral** with the **brake set**, and **get out and look behind the vehicle** or equipment to ensure that your pathway is clear.
- When backing out of a **residential driveway**, walk around the **back of your car** to enter the vehicle. **Every year children are tragically injured and killed because they were playing behind a car where the driver couldn't see them** and backed over them.
- **Equipment or vehicles** which have an **obstructed view to the rear must have an automatic back-up alarm** which may be heard over the usual noise of the work area.
- **Do not assume anyone can hear your back-up alarm** and will move clear of your path when backing a piece of equipment.
- Ensure that your path is clear and that any person in the area is aware of your intention to back up before moving your vehicle.
- When acting as a ground guide to assist in directing a vehicle or piece of equipment, **do not walk backward**. **Look in the direction you are walking** and frequently check to see the **position of the vehicle** you are guiding. Ensure that you **stay in view of the driver at all times**. Prior to beginning, **confirm the hand signals to be used** with the driver.
- When **backing a trailer, have someone guide you**. Remember that you **steer opposite the direction you want the trailer to move**.
- Using your mirrors to back a trailer can be extremely confusing as objects are backwards in a mirror. If possible turn around and look where your trailer is going.
- **Do not attempt to back too close to any object** without someone guiding you.
- Take into account the **extra room** needed when backing up a pickup truck or equipment which may have a tailgate, lift gate, trailer hitch, etc.
- When backing an aerial device, or piece of equipment with an implement raised, **remember to look for overhead obstructions** and hazards as well as what is directly behind you.
- **Keep your speed low when backing any vehicle**. Driving in reverse is harder than driving forward and it is much easier to lose control of a vehicle driving too fast in reverse.
- **Stay out of the direct path of any vehicle backing up**. Never get between a vehicle which is backing up and a fixed or solid object or an excavation; no matter how much clearance you think you have.

Always know what is behind you while driving, especially when backing up. Follow these guidelines for safety when backing up a vehicle.