

NATIONAL MARITIME SAFETY ASSOCIATION, INC.

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President

Dave Adam
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Joseph C. Curto
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James M. MacDonald
Secretary

George H. Brown
Treasurer

919 - 18th Street, NW
Suite 901
Washington, DC 20006
tel (202) 587-4830
fax (202) 587-4888
www.nmsa.us

EXECUTIVE DIRECTOR

Charles T. Carroll, Jr.
Carroll & Froelich, PLLC
chuck@cflaw.us

GENERAL COUNSEL

F. Edwin Froelich
Carroll & Froelich, PLLC
win@cflaw.us



Dedicated to Maritime Safety & Health

TECHNICAL COMMITTEE

Ken Killough
Chairman

NMSA News Bulletin . . . 03/18/2010

REGISTRATION OPEN
2010 NMSA ANNUAL MEETING
June 23-25, 2010
Windsor Court Hotel
New Orleans, LA

Tentative Schedule

Wed., June 23 All Day TC Meeting
Afternoon Board Meeting
Evening Reception - World War II Museum
Thur., June 24 All Day General Meeting
Evening Reception/Dinner
Fri., June 25 Morning General Meeting

Agenda will be sent separately by the end of March.

See attached Registration Form.

- **House Hearings on OSHA Reform Bill (H.R. 2067)**—Rep. Lynn Woolsey (D-CA), Chairman of the House Education & Labor Committee's Subcommittee on Workforce Protections, held hearings on March 16, 2010 on H.R. 2067, the "Protecting America's Workers Act." Rep. Woolsey is the primary sponsor of the bill, which also has 59 co-sponsors. The legislation includes substantial increases in civil penalties and imprisonment for willful violation convictions of the OSH Act. Additionally, it includes mandatory minimum penalties for violations involving the death of a worker (no less than \$50,000). Felony prosecutions for willful violations would also be permitted. Included in the bill is an expanded definition of "employer," which would include "any responsible corporate officer."

Testifying for the **Obama Administration**, and in favor of the legislation, were Assistant Secretary of Labor for OSHA Dr. David Michaels and Deputy Assistant Attorney General John C. Cruden. Dr. Michaels noted DOL Secretary Hilda Solis' "vision" of "good jobs for everyone," and commented that good jobs are safe jobs. He stated that: current OSHA penalty levels do not provide "adequate incentives;" increases in civil and criminal penalties included in the legislation raise the penalties to the same level as 1990, accounting for inflation; "serious violations of the OSH Act that result in death or serious bodily injury should be felonies;" and, the burden of proof in the OSH Act should be changed from "willfully" to "knowingly." In addition, **Secretary Michaels commented that OSHA is planning to "implement long-overdue internal changes in our penalty proposal policies."**

MEMBERS Pacific Maritime Association · New York Shipping Association · Boston Shipping Association · United States Maritime Alliance
Hampton Roads Shipping Association · Mobile Steamship Association · South Carolina Stevedores Association · West Gulf Maritime Association
Georgia Stevedore Association · Southeast Florida Employers Port Association · Midgulf Association of Stevedores · Steamship Trade Association of Baltimore
Ports of the Delaware River Marine Trade Association · British Columbia Maritime Employers Association · Maritime Employers Association (Montreal)



In his testimony for the **Department of Justice (DOJ)** in support of the legislation, Assistant Attorney General Cruden stated that the OSH Act should be amended to make its penalties equivalent to penalties included in environmental laws. He noted that he oversees the Environmental Crimes Section, and that the criminal and civil penalties included in the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act all exceed the civil and criminal penalties included in the OSH Act. In 2005, the DOJ inaugurated its Worker Endangerment Initiative “to highlight that environmental crimes frequently put our country’s workers at risk of death or serious bodily injury.” DOJ has used strong enforcement mechanisms in environmental laws, as well as provisions of Title 18 of the U.S. Code (which cover making false statements, obstruction of justice, and conspiracy to defraud) to, in some cases, prosecute safety violations. Mr. Cruden also comments that the environmental laws include “knowing endangerment” provisions, and responsible corporate officer doctrines “which make[s] company managers criminally liable for illegal conduct they knew about and could have prevented, but failed to prevent.” Finally, he states that the DOJ “supports the strengthening of the OSH Act’s criminal penalties so that they are more consistent with other criminal statutes,” and that “adding felony provisions to the OSH Act...would provide important tools to prosecute employers...”

The Workforce Protections Subcommittee has not yet scheduled a mark-up on this legislation, but clearly this bill will become a priority item for the Subcommittee given the all but certain death of legislation to amend the Taft-Hartley Act. The solicitation of testimony from the Department of Justice, which has never before been asked for its views on OSH Act legislation, is a further indicator of the importance the subcommittee places on increasing OSH Act criminal penalties.

- **NMSA Court Challenge Update on VTL Rule**—The Department of Labor (DOL)/ Department of Justice (DOJ) finally filed the government’s brief on this challenge to the VTL rule, as required, on February 19, 2010. On March 19, 2010, intervenor ILWU is expected to file its brief. The NMSA Legal Review Committee is reviewing these briefs to assist NMSA counsel in filing the NMSA reply brief on April 23, 2010. Final briefs from all parties are due on May 14, 2010.

- **OSHA FY 2011 Budget Request**—The OSHA budget request for FY 2011 is for \$573 million, an increase of nearly \$14.5 million over the FY 2010 budget. OSHA has several goals it wants to meet with the increase in its budget: decrease days away from work by 1% per year over the next two years; reduce injury and illness rates by 4% per year over the next two years; promote employee involvement in safety and health management programs; increase protections for employees by adding a column for musculoskeletal disorders on recordkeeping logs; “shift the burden of compliance onto the employer” and “emphasize corporate-wide enforcement to leverage resources.” OSHA also expects to strengthen its “regulatory impact” by developing “robust standards, regulations and guidance that address significant and newly emerging workplace risks.” OSHA’s proposed FY 2011 budget also increases, by about \$1.5 million, grants to states for OSHA State Plans that are supposed to be “at least as effective as the federal program.” OSHA intends to work with the states on “performance or structural problems” that OSHA has identified as a result of evaluations conducted in FY 2010. Finally, the Susan Harwood Training Grants Program receives an increase of \$240,000.

- **OSHA Official Appointed to Assist Cal/OSHA**—Last October, the House Education & Labor Committee held hearings on deficiencies found in state OSHA plans. This was followed by a proposed budget increase in grants to states to improve their state plans, as noted above in the article on the OSHA FY 2011 budget request. The Cal/OSHA program has been operating for the past 36 years on a “provisional” approval from the federal OSHA program. In an effort to bring the program to final approval status, Cal/OSHA has obtained the services of Mr. Alan Traenkner, assistant regional manager for OSHA’s Region IX. In addition,



the federal OSHA program last fall decided to audit all federally-approved state OSHA programs over the next couple of years. Among the first to be audited is the Cal/OSHA program.

- **OSHA Issues [Revised and Updated Instruction Regarding “OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf \(OCS\)”](#)**—This instruction has an effective date of February 22, 2010. The instruction notes that “OSHA does enforce the OSH Act upon...stevedoring companies with longshoremen working aboard inspected vessels.”

- **OSHA Issues [Proposed Recordkeeping Rule on Work-Related Musculoskeletal Disorders \(MSDs\)](#)**—In the January 29, 2010 *Federal Register*, OSHA issued a proposed rule that would add (“restore”) a column to the OSHA 300 Log that would require employers to “place a check mark in the MSD column...if a case is an MSD that meets the Recordkeeping regulation’s general recording requirements.” The proposed rule also includes a definition of MSD, which OSHA says is identical to the MSD definition included in the 2001 Recordkeeping rule, which defines MSDs as “disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs, except those caused by slips, trips, falls, motor vehicle accidents or other similar accidents” and is recordable if the MSD “is work-related, and is a new case, and meets one or more of the general recording data.”

In the event you were wondering where this is going, this addition to the Recordkeeping rule is likely a means of collecting data for another attempt at promulgating an ergonomics rule. In the proposed rule, OSHA says, “Having more complete MSD data would assist OSHA, and other safety and health policy makers, in understanding MSDs and making informed decisions on policies concerning workplace MSDs.” OSHA’s rationale for MSD recordkeeping is specific: “MSDs...accounted for significantly more occupational illnesses than the combined total for the specific illnesses currently listed on the OSHA 300 Log. Looking only at MSDs that resulted in days away from work” OSHA says that the BLS data indicates MSDs account “for 29% [of days away from work injuries]...and 8.4% of all occupational injuries and illnesses combined.”

In its language, OSHA makes clear that the proposed rule substitutes the term MSD for ergonomics. Recording of MSDs on the OSHA 300 Log will be effective on January 1, 2011. In combination with the Longshore Act, putative MSDs will be an insurance disaster for the industry. Needless to say, this proposed rule will be welcomed by the House and Senate Labor Committees.

Written comments must be submitted to DOL by March 30, 2010. OSHA held a public hearing on the rulemaking on March 9, 2010.

NMSA’s Technical Committee is currently reviewing the proposed rulemaking and the proposal has also been sent to the NAWA Insurance Committee for comment. NMSA and NAWA expect to provide OSHA with joint comments on the proposal.

- **OSHA Marine Cargo Handling “QuickCards”**—In February, OSHA released three safety “QuickCards” for the marine cargo industry. The card topics include: [gangway safety](#), [first aid](#), and [lifesaving facilities](#). These cards were developed by the Longshore Working Group of the MTSNAC. One additional card, aimed at the marine cargo handling industry, is also in development. (*Note: Patience may be required while waiting for the links to open!*)



• **Occupational Safety & Health Review Commission (OSHRC) Issues Important Decision on Employer Responsibility**—On January 8, 2010, OSHRC reversed an administrative law judge's (ALJ) decision that an employer could not be fined by OSHA if an employee failed to wear a **seatbelt**, despite company policy to do so, because of his own "preventable misconduct." Instead, OSHRC affirmed the \$7,000 fine against the company, citing the fact that the employee's supervisor did not inspect the seatbelt to ensure it was in working condition (which it was not) and that neither the company's general foreman nor its safety director followed up on the supervisor's written reports of inspection. Burford's Tree, Inc. argued that employees know that they will be disciplined "if they violated work rules." However, the OSHRC decision argues that an employer cannot rely on its employees to report that seatbelt equipment does not work. A company must enforce its own rules. http://www.oshrc.gov/decisions/pdf_2010/07-1899.pdf (Secretary of Labor v. Burford's Tree, Inc.)

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