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NMSA News Bulletin . . . 10/15/2010

• **Long Work Hours, Fatigue, and Worker Safety**—Responding to a petition from the advocacy organization Public Citizen for regulation of the long work hours of medical residents, OSHA Assistant Secretary David Michaels noted that it is not only medical residents whose safety is compromised by long work hours. Dr. Michaels noted that the investigation into the BP Texas City oil refinery explosion in 2005 showed that worker fatigue was a “contributing factor to the explosion.” The Assistant Secretary said that, “Hospitals and medical training programs are not exempt from ensuring that their employees’ health and safety are protected.” Look for possible future regulations on this issue!

On its face, this issue might appear to be aimed at over-the-road trucking in particular, but the implications go beyond that industry and may have an impact on marine terminals and their operating systems.

• **OSHA Campaign to Prevent Distracted Driving**—OSHA Assistant Secretary David Michaels says that employers should have “a clear, unequivocal and enforced policy against texting while driving.” OSHA threatens to issue citations and penalties “where necessary to end the practice when OSHA receives a credible complaint that an employer requires texting while driving.” OSHA has a new [distracted driving website](#) that includes a model company policy regarding cell phone calls and texting while driving on the job.

• **OSHA: “Return to Basics”**—In a [speech](#) to the United Steelworkers on October 6, 2010, OSHA Assistant Secretary David Michaels again noted that OSHA is “a public health agency” and that it is returning to basics to establish “up-to-date workplace safety and health regulations based on strong science, and emphasizing strong and fair enforcement of those standards.” He commented on several OSHA initiatives, including implementation of an effective Injury and Illness Prevention Program (I2P2) requiring employers “to develop a plan to find all of the safety and health hazards in their facilities that might injure or kill workers—and then fix those hazards.” He also commented, regarding the I2P2, that those programs need workers’ participation to be effective.

Dr. Michaels also discussed the need for “appropriate penalties” that “have a strong deterrent effect,” noted the Administration’s support for legislative changes to OSHA included in the Miner Safety and Health Act, commented that in FY 2010 that OSHA “issued more egregious and significant cases than it has at any time in the last decade,” reminded the union that, at the beginning of October, OSHA’s new penalty policy took



effect. In addition, Secretary Michaels reiterated the need for accurate reporting of injuries and illnesses, and that OSHA is “committed to an aggressive regulatory agenda that focuses on worker protection.”

- **OSHA Report on State Plans Issued**—OSHA has recently issued individual reports on state-run occupational safety and health programs under the OSH Act. The review effort resulted from hearings on the Nevada state plan in the House Education & Labor Committee last year. The plans of 25 states and territories were evaluated over the past year, and the results of the evaluations are provided state by state on the OSHA website.

OSHA Assistant Secretary David Michaels said that, “While we found many positives in the state programs, we also found deficiencies including concerns about identification of hazards, proper classification of violations, proposed penalty levels, and failure to follow up on violations to ensure that workplace safety and health problems are corrected.”

OSHA Citations, Fines & Other Legal Actions of Note

- **Manufacturing Company Fined for Hiding Injuries & Illnesses**—Goodman Manufacturing received 83 willful citations for “failing to record and improperly recording work-related injuries and illnesses.” Proposed fines exceeded \$1.2 million. OSHA Assistant Secretary David Michaels said that “employers and workers need to understand how important accurate data are to workplace safety and health.”
- **New Jersey Decision Allows OSHA Citation as Basis of Tort Claim**—In the case *Van Dunk v. Reckson Associates* the Superior Court of New Jersey Appellate Division, on August 30, 2010, determined that, because OSHA determined that an accident involving Mr. Van Dunk involved a “willful violation” by his employer, under New Jersey Workers’ Compensation Law the OSHA violation constitutes an “intentional wrong” and Mr. Van Dunk’s tort claim against his employer may proceed.

OSHA Regulations & Announcements

- **GAO Report on OSHA Whistleblower Protection Plan Management**—This recently released August report reviews the responsibility OSHA has for investigating whistleblower complaints filed by non federal workers. GAO notes that “OSHA has focused too little attention on the whistleblower program” for over twenty years. GAO states that OSHA’s progress since the last GAO report in 2009 has been minimal. Generally, GAO says that investigator training has not been beefed up, as suggested by the 2009 report, nor has OSHA made progress in ensuring that the whistleblower program has strong internal controls to ensure that the program is operated consistently across the country and performance is sufficiently monitored. OSHA Assistant Secretary David Michaels responded that OSHA is conducting a “top-to-bottom review” of the program within OSHA, and is currently “taking action” on some of the items recommended in the GAO report.
- **Whistleblower Interim Final Rule**—Although the marine terminal industry is not affected by this specific regulation, the rule could be a model for other industry whistleblower protection rules in the future.



- **OSHA Proposes [Changes to On-Site Consultation Program](#)**—In the *Federal Register* of September 3, 2010, OSHA proposes to clarify that an “establishment ordinarily exempt because of the employer’s participation in the OSHA On-Site Consultation Program” might have an inspection or investigation conducted because of “public concern about a particular hazard or substance” that would lead to “inspections of all sites within a specific industry.” Another change included in the Notice of Proposed Rulemaking (NPRM) would permit OSHA to end a consultation visit and “conduct an enforcement visit” as a result of referrals. Comments on the NPRM should be submitted by November 2, 2010.
- **Labor Department Inspector General Critical of OSHA Penalty Reductions**—In a [report](#) issued on September 30, 2010, the DOL Inspector General (IG) criticized OSHA for not determining whether reductions in penalty amounts actually lead to incentives to improve workplace safety. OSHA was also criticized for its failure to consistently review an employer’s overall safety record before reducing fines and penalties. The IG report also comments that “98 percent of all citations were reduced at the maximum rate.” OSHA Assistant Secretary David Michaels noted that OSHA is already looking at new criteria to determine fine amounts, and that OSHA is “statutorily required to consider various factors in assessing penalties and, in doing so, has no discretion with respect to specific reductions.” Dr. Michaels, in his response letter to the IG contested some of the IG findings, agreed with some findings, agreed in part with others, and noted some findings were already addressed by the agency.
- **[Susan Harwood Training Grants Awarded](#)**—OSHA last month awarded \$2.75 million in Susan Harwood Training grants to 16 groups, including several colleges. In particular, the North Carolina Occupational Safety and Health Project and Ohio State University were both awarded grants to study musculoskeletal disorders and ergonomic principles in construction and general industry. Other awards included the topics of fall protection and green jobs industry hazards.

FUTURE MEETINGS

- **NMSA Board**—November 4-5, 2010 in Baltimore, MD
- **NMSA Board**—February 3-4, 2011 in San Diego, CA
- **2011 NMSA Annual**—plans are being finalized for June 22-24, 2011 in Vancouver, BC—details to follow soon

IN MEMORIAM

We offer our sincerest condolences to Stan Burdman whose wife, Barbara, passed away on October 6, 2010. The Burdman family may be reached at: 7213 Cataluna Circle, Delray Beach, FL 33446.

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