

NEWS

McGrath Quoted in OSHA Piece

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Charlotte Litigation and Environmental Member Peter McGrath was quoted in a Bloomberg BNA *Occupational Safety & Health Reporter* article on December 10. The article, "Lawyers Say General Duty Enforcement Tactic Could Have Broad Impact; OSHA Disagrees," overviews the judicial approval of a "novel" OSHA enforcement tactic that could give the agency the ability to impose tougher chemical exposure rules without establishing formal rules. The article can be seen below in its entirety.

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Lawyers Say General Duty Enforcement Tactic Could Have Broad Impact; OSHA Disagrees

By Robert Iafolla

Dec. 10 -- Judicial approval of an apparently novel enforcement tactic could provide the Occupational Safety and Health Administration the means to impose tougher chemical exposure rules on employers without bothering with formal rulemaking, attorneys who consult with businesses on OSHA compliance told Bloomberg BNA.

The agency cited Wisconsin fiberglass maker Fiberdome Inc. for allegedly exposing a worker to dangerous levels of styrene, but the airborne concentration of the chemical didn't violate OSHA's permissible exposure limit for styrene of 100 parts per million.

So regulators claimed a violation of the general duty clause--which spells out employers' basic health and safety responsibilities--and referenced styrene levels that were measured at 1.3 times the National Institute for Occupational Safety and Health recommended exposure limit of 50 parts per million.

"When you have a specific standard as exists here, it's inappropriate for the agency to use the general duty clause to try to establish a more rigorous standard," Jeffrey M. Tanenbaum, partner with Nixon Peabody LLP, told Bloomberg BNA Dec. 9 after examining the citation. "It's not the purpose of the general duty clause, and it really does an end run around the rulemaking process."

Fiberdome has contested the Sept. 19 citation, alleging the general duty clause violation for styrene exposure, as well as three other open citations from the same inspection period. The company didn't respond to Bloomberg BNA requests for comment.

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A Time of Uncertainty

Employer-side attorneys' concerns about OSHA using the general duty clause when a company complied with the exposure limit highlights the uncertainty about how the agency will deal with what it has called dangerously out-of-date chemical exposure standards. (See related story.)

For example, when OSHA chief David Michaels unveiled an online table of alternative exposure limits that are more protective than those set by the agency during an Oct. 24 telephone press conference, he was asked repeatedly if the information would affect enforcement by imposing new obligations or disseminating new information that employers would be expected to know. Michaels insisted that the table of exposure limits was for informational purposes only and wouldn't impact enforcement (43 OSHR 1040, 10/31/13).

OSHA spokesman Jesse Lawder told Bloomberg BNA Dec. 10 that the Fiberdome citation doesn't signal a new enforcement trend of using other exposure limits that are lower than the agency's levels. He said general duty clause citations are reserved for relatively extreme instances, in part because of the high legal burden that the agency must meet to prove them.

"This is not a new strategy," Lawder said of the Fiberdome citation referencing the NIOSH recommended exposure limit.

Instead, the key element that drove the citation was that workers were getting sick from styrene exposure, he said.

Fiberdome's alleged violation of the general duty clause resulted in a citation for a serious violation carrying a \$6,300 proposed fine. In total, OSHA's most recent inspection of Fiberdome resulted in citations for 10 alleged violations with proposed fines of \$49,500, according to OSHA's online enforcement database. Records show the agency has cited the company three times since 2011.

Case Law on Employer's Duty

OSHA appears to have some case law to support its general duty clause allegation against Fiberdome. In a 1987 decision, the U.S. Court of Appeals for the District of Columbia Circuit said that an employer has a legal duty to furnish a safe workplace if it adheres to a specific standard that it knows doesn't protect workers (*Int. Union UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir.)).

The agency referenced the *General Dynamics* decision in a 2003 enforcement memorandum spelling out its policy for using the general duty clause with regard to air contaminant hazards. It said the agency can't use the general duty clause to impose a requirement stricter than that which is required by a standard, except when an employer knows that the standard is inadequate to protect workers.

Attorneys told Bloomberg BNA that they expect Fiberdome to prevail in its challenge of the general duty clause citation. But judicial approval--even at the Occupational Safety and Health Review Commission level--could change the behavior of some companies.

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Peter J. McGrath Jr., partner with Moore & Van Allen PLLC, told Bloomberg BNA Dec. 6 that there are myriad reasons, from legal expenses and bad public relations to notification of lenders and ramifications for insurance premiums, that would motivate employers to comply with stricter, non-OSHA occupational exposure limits rather than deal with a citation.

More broadly, some attorneys suggested an OSHA victory could have the potential to undermine the standard-setting process and sow chaos that could extend beyond chemical regulation to touch virtually any workplace.

"If the citation survives judicial review, then no employer can rely on OSHA standards for determining what is required in the workplace," Patricia A. Poole, a partner with Baker & Hostetler LLP, told Bloomberg BNA Dec. 5. "Whether it's air contaminants or general industry or construction, if OSHA doesn't cite to its own standard, then how will employers know how to comply?"