

Lake County Contractors Association

Safety News

October, 1998

OSHA Issues Respiratory Protection Directive -- OSHA has issued a new enforcement directive to agency field personnel which will also be useful to employers in meeting requirements of the respiratory protection standard. The standard was published Jan. 8, 1998, and employers must be in compliance by Oct. 5, 1998.

Assistant Secretary of Labor for Occupational Safety and Health Charles N. Jeffress said, " This standard significantly improves worker protection. In addition to saving lives and preventing injuries and illnesses, employers will save up to \$94 million a year on injury and illness-related costs."

The new standard (1910.134) applies to all respirator use in general industry, shipyards, marine terminals, longshoring, and construction workplaces. It covers respirators worn to protect employees from exposure to air contaminants above a specified exposure limit or otherwise necessary to protect employee health. It also covers situations where respirators are otherwise required to be worn by the employer, and where respirators are voluntarily worn by employees for comfort or other reasons.

The standard restates OSHA's longstanding policy that engineering and work practice controls should be the primary means to reduce employee exposure to toxic chemicals and that respirators should only be used if engineering or work practice controls are infeasible or while they are being put in place.

Among other things, the compliance directive (CPL 2-0.120) discusses definitions of terms used in the standard: requirements for a written respiratory protection program and respiratory protection program administrator; voluntary use of respirators; selection of respirators and hazard evaluation; the requirements for employers to develop chemical cartridge change schedules for the respirators worn in their workplaces; medical evaluation of an employee's fitness to wear a respirator; and fit testing for employees using negative or positive pressure tight-fitting respirators.

The directive also discusses maintenance and care of respirators; training and information; evaluation of the effectiveness of the respirator program; recordkeeping; and how the respirator standard is linked to other OSHA standards.

The 34 page directive is effective Friday, Sept. 25, 1998 and is available from the LCCA office.

Owners Must Oversee Safety -- *Engineering News Record* reports that the American Society of Civil Engineers, Washington, D.C. has released a new policy statement urging owners to take a more active role in safety by assigning safety roles and responsibilities to contractors

The revised policy on construction site safety, which is the result of two years of study and debate, is in part a reaction to an increasing willingness among federal safety officials to pin blame on engineers and designers for workplace accidents. ASCE's board adopted the policy earlier this month.

The civil engineers reaffirmed their previous policy that safety responsibility falls chiefly with general contractors, who hire and supervise most workers on a jobsite. They must maintain responsibility for workers and methods under their control, says ASCE.

With increasing pressure on engineers and designers to take responsibility for jobsite accidents, the report tries to make clear what each member of a project team must contribute to safety. Most deaths and injuries are the result of single accidents, such as a worker falling or a trench collapsing, and usually are the result of an error by the contractor or its workers, says ASCE.

The project owner must take an active role in site safety by selecting contractors based on their prior safety performance, designating an individual or organization to continuously monitor safety performance during construction and designation in contract documents who is responsible for final approval of shop drawings and details, says ASCE.

Ruling Sought On Burden of Proof for Employee Misconduct - According to BNA's *Construction Labor Report*, the secretary of Labor has asked the U.S. Supreme Court to review a lower court decision that held the secretary responsible for proving that construction workers' failure to use fall protection was foreseeable

The Secretary petitioned for review of the U.S. Court of Appeals for the Fourth Circuit's decision in *Secretary of Labor vs. L.R. Willson and Sons Inc.*, in which the court ruled that the secretary bears the burden of proving that employee misconduct was foreseeable and preventable. According to OSHA, the decision incorrectly held that the secretary of labor has the burden of proof on the issue of employee misconduct. Unpreventable employee misconduct is, instead, an affirmative defense, which the employer has the burden of proving in order to rebut the secretary's case, the secretary contended.

Moreover, the Fourth Circuit's decision "perpetuates longstanding conflicts" among appeals courts on the issue of who has the burden of proof in enforcement proceedings, the secretary said.

The majority of appeals courts—the First, Second, Fifth, Sixth, Eighth, and Eleventh circuits—have held that employee misconduct is an affirmative defense to be proved by the employer; the Third, Fourth, and Tenth circuits have held that proving the foreseeability of employee misconduct is the secretary's burden.

The case stemmed from a call to a local OSHA office in 1994 from then –OSHA administrator Joseph Dear. While at a hotel in Orlando, Fla., Dear observed employees working across the street without fall protection.

A compliance office was sent, the contractor cited and the Occupational Safety and Health Review Commission affirmed a serious citation against L.R. Willson, the steel erection contractor who employed the unprotected workers.

The Fourth Circuit took issue with the commission's allocating L. R. Willson the burden of showing that alleged employee misconduct was unpreventable. It remanded the case to the commission, instructing that Fourth Circuit law required the secretary to prove that the employees' misconduct was preventable. It is on this ruling that the secretary of labor is seeking high court review.

Assured Equipment Grounding Conductor Program - Orange is this quarter's color for contractors following the assured equipment grounding conductor program. As of October 1, 1998, contractors should be using **orange** tape when marking cords.

The assured equipment grounding conductor program simply requires you to test new or repaired power tools and extension cords before first use, after any suspected damage, and all electrical tools and cords at the three-month intervals, marking the cords with colored tape to indicate the month tested. In addition, all cords and power tools must be visually inspected before each use, and a written description of the program and test records must be kept on file at each jobsite.

Safety News is published by the Lake County Contractors Association's Safety Committee, 1312 Washington St., Waukegan, IL – Mike Barnhart, chairman, Gary L. Dowty, executive vice president. Many articles are submitted for publication and while every effort is made to assure the accuracy of the information, LCCA cannot be held liable for any information presented.