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OSHA CONTINUES TREND OF INFORMALLY IMPOSING NEW RULES

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On June 2, 2012, an Occupational Safety & Health Review Commission (OSHRC) Administrative Law Judge (ALJ) ruled that the Occupational Safety and Health Administration (OSHA) could not lawfully expand an existing safety standard through an enforcement memorandum. The decision, which OSHA declined to appeal, was an important one for regulated entities and for those who advocate for clarity and transparency in the regulatory process. Regretfully, the victory may be short lived, since OSHA has already issued other citations based upon the same expanded interpretation from the same enforcement memo.

The enforcement memo at issue relates to OSHA's Personal Protective Equipment (PPE) standard, and purports to now require oil and gas employers to provide employees with flame retardant clothing (FRC) during an explicit set of drilling activities. OSHA issued the [interpretive memo](#) on March 19, 2010 to “[clarify] the need to provide and use FRC during certain drilling, servicing, and production-related operations.”

OSHA inspectors relied upon the FRC Memo in October 2010 to [cite](#) the owners of a North Dakota oil production worksite for not requiring their employees to wear FRC. The employer, Petro-Hunt, contested the citation and participated in a hearing before ALJ Patrick Augustine in November 2011. The ALJ concluded that the FRC Memo did not simply *interpret* OSHA's PPE Standard but rather, amounted to a *new* standard that should have been subject to notice and comment rulemaking pursuant to the Administrative Procedures Act.¹

Judge Augustine reasoned that the FRC Memo transformed the PPE standard from a “performance-based” standard—which grants employers discretion to assess the nature of hazards at their workplaces, and to select appropriate PPE to address those hazards—into a “specification” standard—in this case, an absolute obligation to provide a specific form of PPE (FRC in this instance), during oil and gas operations “regardless of the particular circumstances that may be present at any individual facility.” In striking down the FRC Memo, the ALJ stated:

Complainant cannot ‘require’ anything more than what is authorized by the regulations. If [the Secretary of Labor] wishes to specifically require that FRC be worn in all instances at oil and gas operations, then she must report to the required notice and comment rulemaking process. Otherwise, [OSHA] must independently prove in each case that Respondent had actual notice, or that a reasonable person in Respondent's position would have recognized a hazard requiring the use of FRC.

¹[Secretary of Labor v. Petro Hunt](#), OSHRCJ, No. 11-0873 (June 2, 2012).

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The ALJ also rejected OSHA's argument that the OSHRC should grant deference to OSHA's interpretation in the FRC Memo because, Judge Augustine explained, OSHA's interpretation was "unreasonable and inconsistent" with established regulations. He proceeded to vacate the citation, reasoning that OSHA failed to establish that the employer had actual notice of a need for FRC at the inspected worksite, or that a reasonable person familiar with the circumstances and industry would have recognized the existence of a flash fire hazard in the circumstances presented at that worksite. To support his decision, the ALJ highlighted the following facts:

1. OSHA's failure to establish that flash fires were a hazard at the worksite;
2. None of the employer's employees suffered injuries due to fires in the previous two years; and
3. The employer conducted a thorough hazard assessment, and reasonably concluded that engineering and administrative controls (methods of addressing hazards generally preferred even by OSHA over reliance on PPE), adequately addressed any potential flash fire hazard.

Though the *Petro Hunt* case was a case of first impression on this FRC enforcement memo, and OSHA failed to appeal the ALJ's decision, it does not appear that the ruling will resolve the ultimate question about the FRC Memo's validity. Federal OSHA has already issued a new citation in Texas alleging the same violation in the same circumstances,² and the FRC issue for oil production-related operations is also percolating in State Plan States. Wyoming OSHA, for example, recently tried and lost a similar case after the death of an oilfield drilling rig crew member who was not required to wear FRC. OSHA representatives have also said publicly they do not believe the ALJ's decision has precedential impact.

OSHA's attempt to informally change the PPE standard follows a recent trend by OSHA to skirt notice-and-comment rulemaking through interpretive memos and letters. Other similar examples include:

1. A recent [surge of citations](#) to grain handlers for allowing employees to work inside of grain bins with energized sweep augers (based on a string of inconsistent, contradictory, and unfounded interpretation letters);
2. OSHA's new [residential fall protection directive](#) (STD 03-11-002) and [enforcement memorandum](#), which introduces new legal requirements for construction employers without rulemaking; and
3. OSHA turning its back on fifteen years of precedent and its own still-active [1996 enforcement memo regarding the use of fall protection on top of rolling stock](#), in which OSHA expressed that citations would only issue when "employees are working atop stock (e.g., a railcar) that is positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible."

The *Petro Hunt* decision should embolden businesses facing these and other instances of OSHA circumvention of formal rulemaking to challenge the Agency's actions. OSHA's disregard and disdain for ALJ Augustine's ruling, however, might frustrate such future challenges. One would hope that other businesses cited under OSHA's FRC Memo will follow in Petro-Hunt's courageous footsteps. It is quite perverse, however, that it will likely require a *failed* challenge before an ALJ, and then further appeals to the OSHRC and the U.S. Court of Appeals, to ultimately vindicate ALJ Augustine's *Petro Hunt* opinion.

²[Region 6 News Release](#): 12-1393-DAL (July 25, 2012).