



CENTRAL STATES INSULATION ASSOCIATION'S

INSULATOR

August 2016

President's Message
Looking Forward

TO THE 2016 FALL CONFERENCE

Legally Speaking
OSHA "HOT"
OVER HEAT STRESS

OSHA focusing on heat related illnesses

Industry News

PBGC

Tells Congress

Needs Big Hike in Premiums

OSHA UPDATE

Mandatory

Drug Testing

Occupational Injury & Illness Regulation

Fall Conference

Myrtle Beach

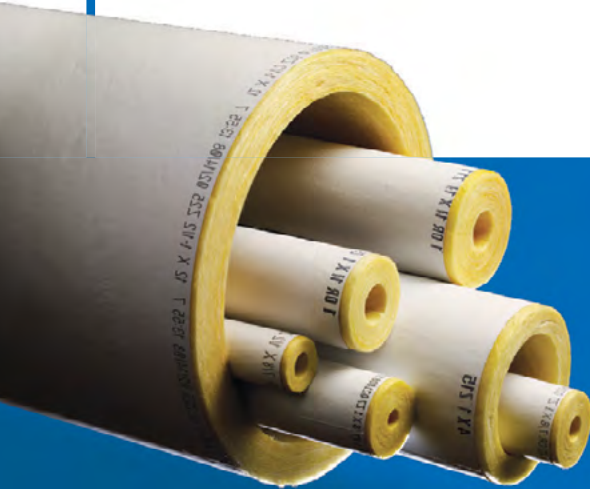
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MAGAZINE



AUGUST 2016 CONTENTS

President's Message Looking Forward	4
Fall Conference Myrtle Beach Event Details & Registration	7-11
Legal Update Department of Labor Rules	13
Industry News PBGC Tells Congress... Don Potetz	15-19
Legally Speaking OSHA "HOT" Over Heat Stress	20-23
OSHA Update Mandatory Drug Testing Regulation	28-31



INSULATOR

Magazine

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editor
Rachel Pinkus

The Central States Insulation Association is a not-for-profit trade association dedicated to working with its member firms and their labor counterparts, the International Association of Heat and Frost Insulators and Allied Workers, to insure that their customers get the best engineered, installed and maintained mechanical insulation systems.

CSIA is dedicated to keeping its members at the forefront in helping their clients and industry partners realize the full benefits of the positive "Green" impact mechanical insulation systems can have on their power, petrochemical, pulp and paper, refining, gas processing, brewery, health care, institutional, food processing, manufacturing and commercial projects.

Disclaimer: The opinions and positions stated in articles published herein are those of the authors and not, by the fact of publication, necessarily those of CSIA. CSIA does not endorse insulating products or systems and shall not be deemed by anything herein to have recommended the use or non-use of any particular insulation system.



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Presidents Message

John C. Stevens - Thermal Solutions Inc.

WOW, I can't believe how fast this past year has come and gone. It seems like yesterday when Brian Willet handed me the gavel at our convention in Naples ... and I'm sure everyone can recall Mike O'Connell and I entertaining you with a little "Play That Funky Music White Boy" rendition. I had a blast and I'm sure at some of our member's expense, but as always, it was all in good fun! I will be calling on Bryan Pieh to head up our late night entertainment this fall since he did such a great job last year. I heard the late night swim event was awesome.

I would like to thank everyone for all your help and participation as I have served this first year. It is my goal to help grow interest and participation in our organization while serving as your President. I would also like to thank Rachel and the Association for all their hard work and dedication in helping press our moment forward.

With our 2016 Fall Conference fast approaching, please make sure you have your reservations filled out and sent in. We are looking forward to a great turn out from our members and there will be plenty of opportunities for educational events and networking with our friends and colleagues. From fishing to golfing at the Grande Dunes Resort, it's sure to be a great time for all.

I'm looking forward to seeing everyone September 8th-10th at the Myrtle Beach Marriott Resort & Spa at Grande Dunes, so get registered!

Until then, everyone be safe and God Bless.

John C Stevens
President
Thermal Solutions Inc.





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thank you for the opportunity
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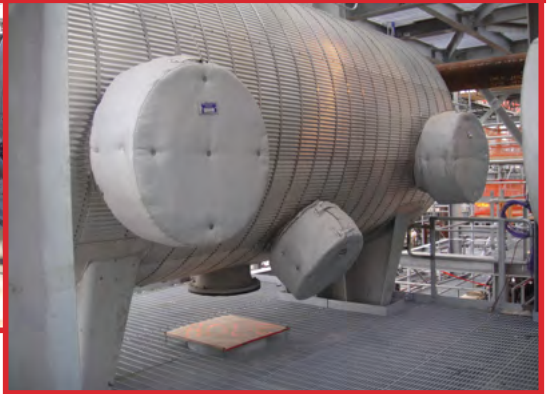


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ESICA CSIA 2016 FALL CONFERENCE

**MYRTLE BEACH MARRIOTT RESORT & SPA
at Grande Dunes
8400 Costa Verde Drive
Myrtle Beach, SC 29572**

September 8-10, 2016

**REGISTER BY
August 7, 2016**



ESICA CSIA 2016

Schedule of Events

THURSDAY, SEPTEMBER 8, 2016

- 1:00-5:00 PM REGISTRATION
2:00-5:00 PM ESICA Executive Board Meeting
3:00-5:00 PM CSIA Executive Board Meeting
5:30-7:30 PM ASSOCIATES RECEPTION

Annual Mesothelioma Raffle!

Dinner on your own

FRIDAY, SEPTEMBER 9, 2016

- 7:00-8:00 AM Breakfast
8:00 AM Opening General Session
8:30 AM NIA Update: Michele M. Jones & Steve Luse
9:00 AM Stephen A. Borg, The Keelen Group, 2016 Presidential Election
9:30-10:15 AM Carl Gould, Hyper Growth
~ Break ~
10:30 - 11:30 AM Donald Brineer "Collection Techniques to Help Manage Your Company's Cash Flow"
10:30 - 11:30 AM Carl Gould "Breaking Through your Personal Barriers to Increase your Sales"
12:00 PM Golf - Grande Dunes Resort Club
12:00 PM Deep Sea Fishing - Hurricane Fleet
12:00 PM Live Dolphin Adventure Cruise
7:30 PM Annual Fall Conference Dinner

SATURDAY, SEPTEMBER 10, 2016

- 8:00 AM Breakfast
8:30 AM ESICA & CSIA Breakout Meetings
10:30 AM ESICA & CSIA Board Meeting
11:30 AM Joint Board Meeting

Coming together is the beginning

Keeping together is the progress

Working together is success

Henry Ford

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NIA UPDATE



Michele M. Jones, Executive Vice President/CEO of the National Insulation Association (NIA), will provide an update on the Foundation's activities; and **Steve Luse**, NIA President and President/CEO of Luse Holdings, Inc., will provide an update on NIA activities.



2016 UPCOMING PRESIDENTIAL ELECTION

Stephen A. Borg from The Keelen Group, will give us the scoop on the behind the scenes of the 2016 Presidential Election!

Donald B. Rineer, Esq.



"Collection Techniques to Help Manage Your Company's Cash Flow"

Donald B. Rineer is a shareholder and director with Dunlevey, Mahan & Furry in Dayton, Ohio. Donald's practice focuses on representation of the firm's business clients in mergers and acquisitions, complex transactions, corporate, real estate, construction, technology and litigation matters. Donald has been a speaker on business and construction topics to various interested groups.

Keynote Speaker - Carl Gould

Hyper Growth



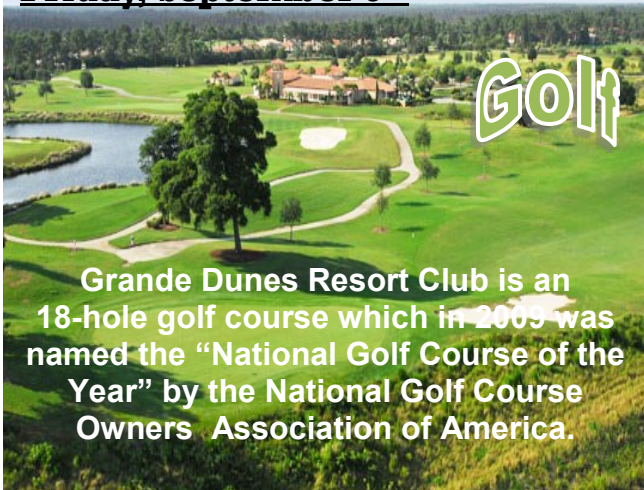
Carl Gould has spent over 18 years studying under masters in the personal and professional development field. Carl is known for his innovative approach to Business Mentoring and Business Coaching. Carl explains that he is a true entrepreneur because, "I can't work for anyone else."

~~~~~

**At the breakout session Carl will address the Associates.**

**"Breaking through your personal barriers to increase your sales"**

### **Friday, September 9<sup>th</sup>**



Grande Dunes Resort Club is an 18-hole golf course which in 2009 was named the "National Golf Course of the Year" by the National Golf Course Owners Association of America.

***Shirt with collar required, no jeans or denim***

A limited number of rental club sets are available at \$42.00 per set. The golf course requests that rentals be paid for at the golf course and that you request your clubs no later than 7 days prior to the event. 843-692-3725

### **Mesothelioma Research Raffle!**

Join us Thursday night at the Associates' reception for our Annual Mesothelioma Research Fundraiser.



### **Friday, September 9<sup>th</sup>**

Come fish with us!

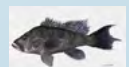
Deep Sea Fishing



You will be bottom fishing for black sea bass, porgies, grunts, and possibly flounder on a private charter on the Lucky Strike. Register early!



**Limited to 12!**



***Additional boats can be made available if there is enough interest. Register early!***

### **Friday, September 9<sup>th</sup>** (limited to 40)

#### **Live Dolphin Adventure Cruise**



Hurricane Fleet Marina is right in the middle of the "Seafood Capital of the World," and shrimping is one of our most important industries. How about giving yourself an unforgettable experience of how and where shrimp are caught?

Join us for a two hour educational & fun for all ages cruise on a 90-foot cruise boat that will take you out along side a working shrimp boat. Your guide will explain shrimping as you watch the fishermen harvest the delicacies. Porpoises feed off the "by-catches" from the shrimping nets, their presence is felt as they jump along side the boat.

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**Call: 800-228-9290**

**By Friday, August 7, 2016**

**ESICA Group Rate is \$164 per night**



**The Myrtle Beach Marriott Resort & Spa at Grande Dunes, SC features a state-of-the-art spa, two swimming pools, a health club, championship golf and tennis, and exquisite on-site dining.**

***AVERAGE SEPTEMBER TEMPERATURE: 80° DAY, 60° EVENING—Casual Dress***

Guest room rates will be in effect from Thursday, September 8, 2016 (arrival date) until Sunday, September 11, 2016 (departure date), extensions prior to or past the EVENT are subject to room availability at the time the reservation is called in by you. Group rates will apply to all room nights pre and post conference dates. The Hotel CANNOT guarantee rooms and group rates after August 7, 2016.

**All reservations need to be cancelled 7 days prior to arrival to avoid being charged 1 night room and tax.**



# 2016 ESICA & CSIA Fall Conference Registration



Register online: [www.esica.org](http://www.esica.org) or [www.csiaonline.org](http://www.csiaonline.org)

\*Please complete one form for each person or couple attending.

Name: \_\_\_\_\_ Badge Name: \_\_\_\_\_

Spouse/Guest Name: \_\_\_\_\_ Badge Name: \_\_\_\_\_

Company Name: \_\_\_\_\_ Title: \_\_\_\_\_

Company Address: \_\_\_\_\_  
City State/Zip

Phone: \_\_\_\_\_ Cell: \_\_\_\_\_ Email: \_\_\_\_\_

### REGISTRATION FEES

|                                                                 | By Aug. 7 <sup>th</sup> | After Aug. 7 <sup>th</sup> |
|-----------------------------------------------------------------|-------------------------|----------------------------|
| Contractor Members                                              | — \$650.00              | — \$700.00                 |
| Contractor Member & Spouse                                      | — \$850.00              | — \$900.00                 |
| Associate/ Distributor/Fabricator Member                        | — \$750.00              | — \$800.00                 |
| Associate / Distributor/Fabricator Member & Spouse              | — \$950.00              | — \$1000.00                |
| Non-ESICA or CSIA Members                                       | — \$1000.00             | — \$1050.00                |
| <b>CREDIT</b> (Associates, Distributor Fabricators who Sponsor) | — (\$100.00)            | — (\$100.00)               |
| Unregistered guests & children (attending final dinner)         | — \$100.00 <i>pp</i>    |                            |
| <b>Total Registration:</b>                                      | \$ _____                | \$ _____                   |

### Cost x number of people

### Total

#### Golf Tournament

Friday September 9<sup>th</sup> includes Lunch

— \$175.00 x \_\_\_\_\_ \$ \_\_\_\_\_

Average score or handicap (s): \_\_\_\_\_

#### Fishing Trip

Friday, September 9<sup>th</sup> includes Lunch

— \$175.00 x \_\_\_\_\_ \$ \_\_\_\_\_

#### Dolphin Adventure Cruise

Friday, September 9<sup>th</sup> includes Lunch

— \$125.00 x \_\_\_\_\_ \$ \_\_\_\_\_

### Total Costs Remitted:

\$ \_\_\_\_\_

Payment by either check payable to ESICA or CSIA or VISA, MASTERCARD or AMERICAN EXPRESS.....

Credit Card # \_\_\_\_\_ Exp. Date: \_\_\_\_\_ Signature: \_\_\_\_\_

NOTE: 90% Refund on cancellations received prior to August 7, 2016. No Refund on cancellations received after August 7, 2016.

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- Sponsor's name displayed throughout the conference
- A slide show presentation during the conference
- Acknowledgement in our Newsletter **\_\_ YES, I would like to give a 3 - 5 minute presentation**

**\_\_ YES, I will sponsor -** Send a \$500 check to ESICA or CSIA or charge (all credit cards accepted)

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Please return your completed form with your payment by **August 7, 2016**

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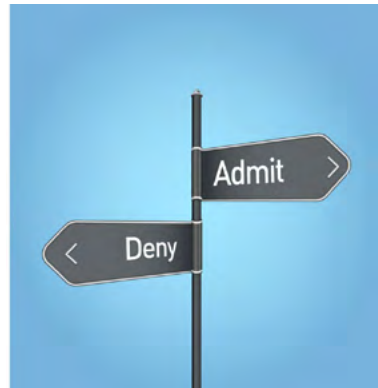
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### Does an Independent TPA have a Financial Incentive to Deny Claims?

As we discussed in the June 2016 Newsletter, the standard of review in ERISA cases is important. When courts decide how much deference to give a claim administrator's decision they frequently consider any potential conflicts of interest the administrator may have. To minimize potential conflicts of interest, some health plans hire completely independent third party administrators (TPAs) who have no financial interest in the outcome of claims decisions. However, this practice has raised questions as to whether these independent TPAs are actually independent because they receive their compensation from and are employed by the plans. Recently, the Southern District of New York concluded that if a TPA's compensation does not vary based on the amount of claims it approves or denies than it has no direct financial interest in the outcome of its decision. As a result, the court determined there was no bias and applied the most deferential standard of review.



### The Push-Back Against the New DOL Fiduciary Rule



The Department of Labor (DOL) recently finalized the long-anticipated financial advisor rule in April. The rule, which takes effect beginning April 2017, requires financial advisors to recommend what is in the best interest of clients when they offer guidance on retirement assets, for example, 401(k)s, individual retirement accounts or other qualified money plans. Although the regulations were a long time coming, the backlash began almost immediately after the final publication. The House passed a resolution attempting to block the rule which was recently vetoed by President Obama. Along with the discord in Congress, a number of groups have filed lawsuits challenging the rule. By early June, federal courts throughout the country had received at least nine separate lawsuits. The Secretary of the DOL, Thomas Perez, vows to fight the lawsuits and continues to work with financial advisors to implement the fiduciary rule. While financial advisors may be tempted to wait and see if the courts overturn the rule, many experts believe that the rule will withstand the litigation, noting that the Plaintiffs' cases seem "weak." Despite the lawsuits and pushback, financial advisors should plan on being in full compliance with the rule by April 2017.

### Plan Pointer- Check Your Parity

Recently the Department of Labor (DOL) issued guidance with examples of Non-Quantitative Treatment Limitations (NQTLs) that may violate the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The MHPAEA requires parity between plan provisions for medical and surgical benefits and plan provisions for mental health and substance abuse benefits. It can be very difficult evaluating the parity of Non-Quantitative Treatment Limitations (NQTLs). Plan administrators and sponsors should carefully review this new DOL guidance and check their plans for any of the red flags highlighted by the DOL. Violations of the MHPAEA can result in fines of up to \$100 per day per covered individual.

### Questions?

If you have any questions about the material contained in this newsletter or any employee benefits questions, contact one of our experienced attorneys.

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## PBGC Tells Congress It Needs Big Hike in Multiemployer Premiums

*Multiemployer pension premium increases need to be more than four and a half times what they're set for under current law to keep the PBGC's insurance program for multiemployer funds from becoming insolvent, the agency said in a report to Congress.*

**Bloomberg  
BNA**

The Pension Benefit Guaranty Corporation's report issued June 17 reiterated a message the agency has given before: that without big increases in premiums, the multiemployer insurance program will run out of money. The report gives Congress a roadmap for fixing the multiemployer pension system, which is failing on many fronts.

The one-time report by the PBGC is required under the Multiemployer Pension Reform Act, also known as the Kline-Miller Act.

In a separate annual projections report, the agency said that under both 10-year and 20-year projections, the multiemployer insurance program is likely to run out of money by the end of 2025, and that there is considerable

risk that it could run out before that date. This echoes previous warnings the agency has issued about its multiemployer program.

### Better Outlook in Projections Report

The projections report had a better prognosis for the agency's program for single employer pension plans—finding that it's likely, although not certain, to improve without any premium increases.

Multiemployer plans are collectively bargained and involve more than one employer. Former PBGC Director Joshua Gotbaum, now a guest scholar with the Brookings Institution in Washington, told Bloomberg BNA June 17 that it's been very clear that premiums assessed to multiemployer plan sponsors

are too low. The PBGC's finding in its report that premiums need an order of magnitude hike isn't surprising, he said.

The report indicates that single-employer plan premiums are

**The report indicates that single employer plan premiums are about seven times the level of multiemployer plans**

about seven times the level of multiemployer plan premiums, Gotbaum said. This shows that most multiemployer plans can afford the increases the PBGC has requested, he said. For the plans that can't afford such increases, Congress can create a formula in which such plans have their premium rates and

hikes capped, he added.

### Design of Increase Critical

The PBGC's report to Congress showed that premium income required to pay average projected multiemployer plan obligations varies substantially.

Needed premium income varies due to whether premiums are needed for 10 or for 20 years and whether plans adopt suspensions and partitions, the report said. In addition, the "extent to which premiums are not paid out of existing plan assets or otherwise assessed so as to avoid accelerating the insolvency of troubled plans," will determine how much of an increase is required, the report said.

The report said that, based on those variables, the range of potential increases is wide, ranging from 59 percent to 85 percent for 10 year solvency and from 363 percent to 552 percent for 20 year solvency.

Premium increases that are designed and structured properly may encourage additional contributions, result in continued plan participation and strengthen the multiemployer insurance system, the report said.

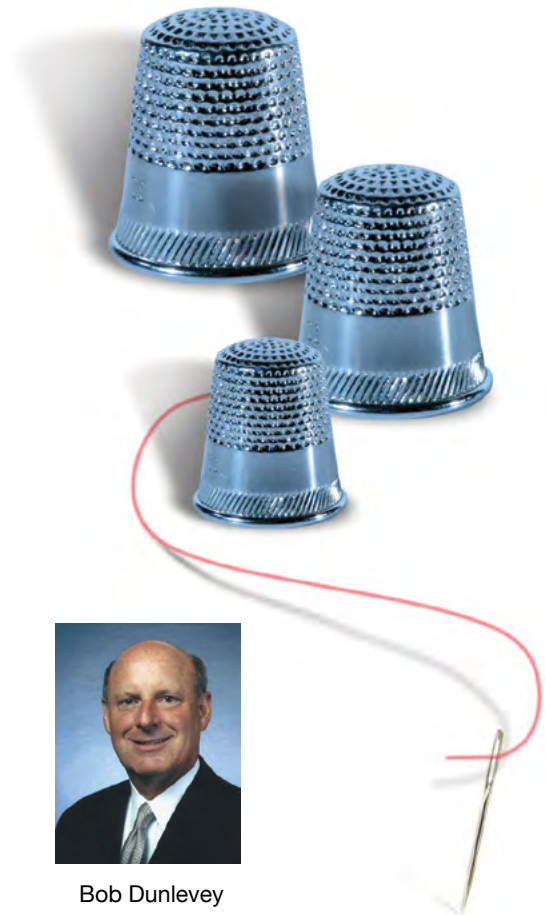
### Bad Design Could Speed Withdrawals

A poorly designed premium increase, on the other hand, may encourage employer withdrawals and quicken plan insolvency, the report said. This would increase costs to plan participants and require even larger premiums, the PBGC said. The report said the administration's latest budget proposed a structure than can help resolve the multiemployer program's financial woes. The PBGC's board would have authority under the proposed budget to carefully structure premiums by assessing variable rate premiums based on a plan's funding and exit premiums that wouldn't affect a plan's solvency. Such a structure would also give the board the flexibility to avoid placing unmanageable burdens on the most troubled plans, the report said.

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# Don Poteet

*It is with great sadness and heavy hearts  
that we inform you*

**Donnie** Joe Poteet, age 64 of Arcanum, Ohio passed away at 9:04 PM Wednesday July 20, 2016 at his residence. He was born November 13, 1951 in Monterey, TN and the son of the late Joe Bob and Motie Mae (Maddle) Poteet.

Donnie was retired as an Insulator from the International Association of Heat and Frost Insulators Local 50.

He was very committed to his

hobbies and memberships including golf, woodworking, tractors and most of all his family. He was a member of St. Mary's Catholic Church of Greenville, Beechwood Golf Course and his union.

In addition to his parents, he was preceded in death by his father and mother

in law Alfred Stephen and Mary Alice (Wadyziak) Kramer; brother Kenneth Poteet; twin sisters Pam Harbaugh and Patricia Poteet; nephews Michael Waters and Chad Black and niece Christina Campbell.

Donnie is survived by his wife Karen Anne (Kramer) Poteet of Arcanum.

They were married August 7, 1971. Son, Daniel Joseph (Kirsten Elaine) Poteet of Greenville; daughter, Christina Anne (Marcus) Glover of Clayton, OH; dog, Max; grandchildren, Bethanie Dawn (Logan) Hatcher, Gwyneth Aubrey Poteet, Nigel Joseph Glover and Lauren Cirah Glover; great granddaughter, Violet Elaine Anne Hatcher; siblings, Jackie Conaster of Phoenix, AZ, Bobbie (Robert) Ripple of Arcanum,

Joseph Michael (Teresa) Poteet of St. Petersburg, FL and Tina Marie (Jack Waters) Poteet of Clayton; In laws, Marcia Meyer of Greenville, Roger Kramer of Greenville and Terri Anne (Bill) Tucker of Leesburg, FL.; as well as numerous nieces and nephews.

The family

would like to express their sincere appreciation to Dr. Jilani for her continued support and care.

It is the wishes of the family that memorial contributions be given to the Breath of Life Foundation 4998 State Route 34, Winfield, WV 25213.



# OSHA “HOT” OVER HEAT STRESS



Bob Dunlevey

*OSHA is now focusing on heat related illnesses in the workplace even though it has no Standard which specifically addresses working in a hot environment. It is aggressively pursuing employers and, in a Washington memo to OSHA’s Regional Administrators, it stated that “this memo directs the Field to expedite heat-related inspections and to issue Citations ... as soon as possible.” Therefore, employers need to take action now to ensure a workplace free of heat hazards or face costly citations and litigation.*

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OSHA believes that employers should actively encourage at least 5 to 7 oz. of fluids be consumed every 15 to 20 minutes.

**A**s most employers know, but seldom address adequately, working in a hot environment puts stress on an employee's body cooling system. Too much heat can result in dehydration, cramps, heat exhaustion and even a fatal heat stroke. The risk of heat stress depends upon many factors related to the individual employee and this makes the challenge of making a safe workplace for all even more challenging. Those risk factors include the employee's physical condition, the temperature and humidity, clothing worn, the pace of work and how strenuous it may be, exposure to sun and environmental conditions such as air movement.

In utilizing OSHA's General Duty Clause, Section 5(a)(1), the agency is attempting to make "new law" further regulating employers' activities. A violation of the General Duty Clause may exist when workers have been working in a hot environment, the employer is aware of the heat-related dangers, and has not taken adequate protective action for the workers – such as water, rest and shade. But, OSHA expects even more than water, rest and shade and that is why employers must take additional steps to address heat in the workplace. OSHA also insists upon implementing an acclimatization program for new employees and those returning from extended time away, such as

vacations or leaves of absence. It also urges implementing a work/rest schedule and providing a climate controlled area for cool down. For those employers utilizing temporary employees, there is a greater risk of heat-related illnesses and OSHA would urge greater care in adopting an acclimatization program for them. Simply telling your employees that it is a hot day and they should take breaks when they need to and drink as much water as necessary, will not meet OSHA's expectations and could very easily result in a citation. OSHA believes that employers should actively encourage at least 5 to 7 oz. of fluids be consumed every 15 to 20 minutes.

OSHA is urging that each employer establish a heat stress program, but when the employer does so it may very well be recognizing that there is a hazard in the workplace which needs to be addressed meaningfully. Then, the Compliance Officer may find your program inadequate. This is a dilemma for employers yet unresolved by the courts. A heat stress program can have many components, including:

#### TRAINING

- Hazards of stress
- Responsibility to avoid heat stress
- Recognition of danger signs/symptoms because employees may not recognize their own
- First aid procedure
- Effects of certain medications in

**“OSHA is urging that each employer establish a heat stress program”**

hot environment

### PERSONAL PROTECTIVE CLOTHING/EQUIPMENT

- Light summer clothing allowing free movement and sweat evaporation
- Loosely worn reflective clothing to deflect heat
- Cooling vest and wetted clothing for special circumstances

### ADMINISTRATIVE ENGINEERING CONTROLS

- Assess the demands of all jobs and have monitoring and control strategies in place for hot days and hot workplaces
- Schedule hot jobs for cooler parts of the day
- Reduce physical demands
- Permit employees to take intermittent rest breaks with water breaks and use relief workers
- Have air conditioning and shaded areas available for breaks/rest periods with ice available

- Increase air movement
- Exhaust hot air and steam

### HEALTH SCREENING ACCLIMATIZATION

- Let employees get used to hot working conditions by using a staggered approach over several days, such as beginning work with 50% of the normal workload and time spent in the hot environment and then generally increase it over five days
- Make employees aware that certain medications, such as Diuretics, anti-hypertensives (blood pressure), anti-cholinergics (pulmonary disease – COPD), and alcohol abuse, can exacerbate problems.

OSHA is also inclined to cite an employer if prompt remedial action is not taken when an employee falls victim to heat stress. Employers should establish specific procedures for heat-related emergencies and provisions that First Aid be administered immediately to employees



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who display symptoms of heat-related illness. Those employees may very well resist First Aid because of the confusion caused by heat stress. Therefore, training on the signs and symptoms is also encouraged.

With summer here, and if it is to be anything like last summer, heat stress issues could rear their ugly head. Don't be caught ill-prepared for an incident and a subsequent visit by OSHA – establish your heat stress program today. Dunlevey, Mahan & Furry currently is defending a significant heat stress fatality case and further guidance from the courts could result from this case. For more information regarding heat stress programs and the law, contact Bob Dunlevey, Dunlevey, Mahan & Furry (937) 223-6003.

**“Don't be caught ill-prepared for and incident and subsequent visit by OSHA”**

**NOAA's National Weather Service**

**Heat Index  
Temperature (°F)**

|     | 80 | 82 | 84  | 86  | 88  | 90  | 92  | 94  | 96  | 98  | 100 | 102 | 104 | 106 | 108 | 110 |
|-----|----|----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 40  | 80 | 81 | 83  | 85  | 88  | 91  | 94  | 97  | 101 | 105 | 109 | 114 | 119 | 124 | 130 | 136 |
| 45  | 80 | 82 | 84  | 87  | 89  | 93  | 96  | 100 | 104 | 109 | 114 | 119 | 124 | 130 | 137 |     |
| 50  | 81 | 83 | 85  | 88  | 91  | 95  | 99  | 103 | 108 | 113 | 118 | 124 | 131 | 137 |     |     |
| 55  | 81 | 84 | 86  | 89  | 93  | 97  | 101 | 106 | 112 | 117 | 124 | 130 | 137 |     |     |     |
| 60  | 82 | 84 | 88  | 91  | 95  | 100 | 105 | 110 | 116 | 123 | 129 | 137 |     |     |     |     |
| 65  | 82 | 85 | 89  | 93  | 98  | 103 | 108 | 114 | 121 | 128 | 136 |     |     |     |     |     |
| 70  | 83 | 86 | 90  | 95  | 100 | 105 | 112 | 119 | 126 | 134 |     |     |     |     |     |     |
| 75  | 84 | 88 | 92  | 97  | 103 | 109 | 116 | 124 | 132 |     |     |     |     |     |     |     |
| 80  | 84 | 89 | 94  | 100 | 106 | 113 | 121 | 129 |     |     |     |     |     |     |     |     |
| 85  | 85 | 90 | 96  | 102 | 110 | 117 | 126 | 135 |     |     |     |     |     |     |     |     |
| 90  | 86 | 91 | 98  | 105 | 113 | 122 | 131 |     |     |     |     |     |     |     |     |     |
| 95  | 86 | 93 | 100 | 108 | 117 | 127 |     |     |     |     |     |     |     |     |     |     |
| 100 | 87 | 95 | 103 | 112 | 121 | 132 |     |     |     |     |     |     |     |     |     |     |

**Likelihood of Heat Disorders with Prolonged Exposure or Strenuous Activity**

- Caution
- Extreme Caution
- Danger
- Extreme Danger

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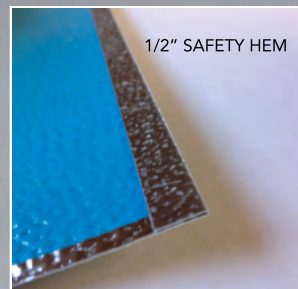
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- Political Strategist Speaker Matt Keelen; and
- Website Strategist Speaker Joanna Pineda.



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# Mandatory Drug Testing

## Occupational Injury & Illness Regulation



Gary Aumen

*The following information is to provide an update on the requirements set forth in OSHA's commentary on the new electronic reporting rule, otherwise known as, the Revised Recording and Reporting Occupational Injuries and Illnesses regulation.*



### Revised Regulation

In May 2016 OSHA issued a final rule which revises the Recording and Reporting of Occupational Injuries and Illnesses regulation. This final rule, which in general is effective on January 1, 2017, requires certain employers to electronically submit the injury and illness information they are already required to keep under existing OSHA regulations. It does not change, however, an employer's obligation to

complete and retain injury and illness records. The final rule also includes provisions that prohibit employers from retaliating against workers from making such reports. The anti-retaliation provisions become effective on August 10, 2016. There is some question as to the enforcement of these anti-retaliation provisions. Up until this new rule becomes effective the only redress an employee had because he or she alleged that they

A photograph of a laboratory setting. In the foreground, there is a rack of test tubes with various colored caps (yellow, purple, blue, green). To the right, a microscope is visible with a petri dish on its stage. In the background, a person wearing a white lab coat and a stethoscope is partially visible, holding a white plastic bag. The overall scene is brightly lit with a blueish tint.

EFFECTIVE  
*January 1, 2017*

were discriminated against by their employer because of engaging in protected activity was by filing a complaint alleging discrimination under Section 11(c) of the Occupational Safety and Health Act. Now there will be an argument that OSHA can cite an employer for violation of Title 29 Code of Federal Regulations Section 1904.35(b)(1)(iii)(B) and (iv). If OSHA is able to take advantage of this enforcement, an OSHA compliance officer will be able to cite the employer for violation of this section as a serious, other than serious or willful violation, which if not vacated, will obligate the employer to abate as well as pay a fine. Abatement may require rehiring the discharged employee with back pay.

### **OSHA's Commentary Regarding Post-Accident Drug Testing**

While the anti-retaliation provisions require educating employees on their rights to report on-the-job injuries and

illnesses without fear of retaliation by the employer, the commentary that accompanied the final rule includes other cautions for employers. OSHA has raised a concern with mandatory or blanket post-accident drug testing.

OSHA explained that to obtain the appropriate balance, drug testing policies should limit post-accident testing to situations in which employee drug use is likely to have contributed to the accident, and for which the drug test can accurately identify impairment caused by drug use. Therefore, an employer is not required to suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.

In taking this position OSHA also addressed concerns that the final rule could potentially

prevent an employer from complying with the requirements contained in workers' compensation laws.

an employer conducts drug testing to comply with the requirements of a state or federal law or regulation,

## **an OSHA compliance officer will be able to cite the employer for violation of this section**

In response, OSHA explicitly stated that such concerns were unwarranted. It further stated that "if

the employer's motive would not be retaliatory and the final rule would not prohibit such testing."



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This is especially true because 29 U.S.C. 653(b)(4) prohibits OSHA from superseding or affecting workers' compensation laws. None of the commentary extends to whether requirements of a workers' compensation insurance policy that creates a mandatory drug testing requirement would also be exempted from these concerns.

**Summary**

You need to be aware that the commentary addressing mandatory drug testing is just that – a commentary. Essentially OSHA is stating that it will look with suspicion at any mandatory post-accident drug testing program as a potential violation of Section 11(c) of the Act. At this time, whether you review and/or revise your current

post-accident drug testing program is a business decision not a compliance decision. But, you need to be aware that this commentary when coupled with an official OSHA memorandum on March 12, 2012 demonstrates that OSHA is concerned about any actions employers may take that in any way, directly or indirectly, may cause employees to hesitate

or refuse to report on the job injuries or illnesses because of fear of retaliation by the employer.

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