January 4, 2017

The Honorable David Michaels
Assistant Secretary
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov


Dear Dr. Michaels:

The Coalition for Workplace Safety (“CWS”) is comprised of a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone’s concern. Improving safety can only happen when all parties—employers, employees, and OSHA—have a strong working relationship.

On behalf of its members, CWS submits the following comments on OSHA’s Proposed Rule, Standards Improvement Project-Phase IV (“SIP-IV”) (81 Fed. Reg. 68504, October 4, 2016). SIP-IV is the fourth review by OSHA in an effort to “remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in OSHA’s safety and health standards, which will permit better compliance by employers and reduce costs and paperwork burdens where possible, without reducing employee protections.” 81 Fed. Reg. 68504. OSHA noted in SIP-III that “[h]istorically, the Standards Improvement Project removes or revises individual requirements within rules that are confusing, outdated, duplicative or inconsistent” which “helps employers to better understand their obligations, promotes safety and health for employees, and leads to increased compliance and reduced compliance costs.” 76 Fed. Reg. 33590.

While we express no opinion about many of the proposed revisions to OSHA standards contained within SIP-IV, some of the proposals seek to make substantive changes which will significantly impact employers and are inconsistent with the expressed intent for the SIP process. This includes: (1) proposing to add a cross-reference to Section 1904.5 in Section 1904.10 for recording occupational hearing loss cases; and (2) removing the well-established and relied upon term “unexpected” from the lock-out/tag-out (“LOTO”) standard.

These proposed revisions and deletions substantially change the standards and will necessarily
increase burdens and costs on employers as well as their vulnerability to OSHA citations. OSHA is not just removing or revising outdated or duplicative provisions with these proposals, which is the stated purpose behind the Standards Improvement Project. Instead, OSHA is attempting to make these substantive changes through the more informal SIP process as a way to avoid having to engage in a more critical analysis of the supposed benefits and real costs that will be imposed on employers. These types of substantive changes and deviations from the Agency’s longstanding policies and positions are more appropriate in a comprehensive rulemaking effort where each standard is separately opened up for review and supported by appropriate analyses and rulemaking components. This would give affected parties sufficient notice of the proposed changes and would allow for adequate time to offer comprehensive comments for the Agency to consider before making any final changes. OSHA’s attempt to avoid traditional rulemaking for such substantive changes is inconsistent with the intention of SIP, and bundling these significant changes with others that are not camouflages the significance of these changes.

For the reasons set forth below, CWS urges OSHA to withdraw the following revisions contained under the proposed rule.


In this rulemaking, OSHA proposes to “clarify” the relationship between §§ 1904.10(b)(6) and 1904.5 by adding a cross-reference to § 1904.5 to make clear that health care professionals must comply with § 1904.5 when making a determination of whether an employee’s hearing loss is work-related.

Section 1904.10(b)(6) addresses the recording criteria for cases involving occupational hearing loss. This section provides that “[i]f a physician or other licensed health care professional determines that the hearing loss is not work-related or has not been significantly aggravated by occupational noise exposure, you are not required to consider the case work-related or to record the case on the OSHA 300 Log.” 29 C.F.R. 1904.10(b)(6).

Section 1904.5 sets out the criteria for determining whether an injury or illness is work-related. 29 C.F.R. § 1904.5. Specifically, § 1904.5(a) establishes a geographic presumption—that if an injury occurs at the workplace it is work-related—for injuries and illnesses resulting from events or exposures occurring in the work environment. Id.

OSHA’s proposed “clarification” is not as innocuous as it may seem in light of the agency’s position when the final rule for § 1904.10 was promulgated. In the regulatory history for the final rule, OSHA stated,

OSHA agrees . . . that it is not appropriate to include a presumption of work-relatedness for hearing loss cases to employees who are working in noisy work environments. It is possible for a worker who is exposed at or above the 8-hour 85-dBA action levels of the noise standard to experience a non-work-related hearing loss, and it is also possible for a worker to experience a work-related hearing loss and not be exposed above those levels. Therefore, the final rule states that there are no special rules for determining work-relationship and restates the rule’s overall approach to determining work-relatedness —
that a case is work-related if one or more events or exposures in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss.


OSHA goes on to state, “[t]he final rule’s approach to determining work-relatedness differs from the January 2001 rule for three reasons….The final rule also continues the 2001 rule’s policy allowing the employer to seek the guidance of a physician or other licensed health care professional when determining work-relatedness of a hearing loss cases.” Id.

If OSHA intended for §1904.5, specifically the presumption of work-relatedness, to apply to occupational hearing loss cases it knew how to do so explicitly during the rulemaking. OSHA elected not to apply the approach to determining work-relatedness in §1904.5 stating, “the approach used in the January 2001 rule is not supported by comments to the docket. None of the commenters supported the presumption, while many opposed it.” Id.

OSHA’s proposed change of adding a simple cross-reference will encompass the geographic presumption and would change the intent of §1904.10(b)(6). Nothing in §1904.10(b)(6) requires a physician or licensed health care professional to use the same criteria of work-relatedness in §1904.5. This proposed revision is a substantive revision to the recordkeeping provisions for occupational hearing loss, expanding the circumstances that will qualify as work-related. This conflicts with the Agency’s clear intent when the final rule was promulgated and is inappropriate as a proposed revision in the SIP process.

II. Eliminating “Unexpected” from the LOTO Standard is a Fundamental Change that Deviates from OSHA’s Longstanding Policies and Will Impose Significant Burdens on Employers (81 Fed. Reg. 68506-07, 68542-43).

As acknowledged by OSHA in SIP-IV, when the LOTO standard was first adopted by the Agency in 1989 it was specifically limited to only cover “the servicing and maintenance operations in which the unexpected energization or startup of the machines or equipment, or the release of stored energy could cause injury to employees.” 29 C.F.R. §1910.147(a)(1)(i) (emphasis added) (54 Fed. Reg. 36687, Sept. 1, 1989, as amended at 54 Fed. Reg. 42498, Oct. 17, 1989). In the original publication of the LOTO standard the term “unexpected” appears eight times and was even italicized twice to bring emphasis to the term and to clarify its scope and application. Despite the unambiguous and clear meaning of the word “unexpected,” which has been in place for nearly 30 years and has been consistently interpreted by the Review Commission and Federal Courts, OSHA now claims that this term has been “misinterpreted” all these years and seeks to delete the word from the LOTO standard. 81 Fed. Reg. at 68506.

The term “unexpected” is used throughout the standard and is included multiple times within the sample Lockout Procedure offered by OSHA in Appendix A. Removing this well understood term that has been a cornerstone of the LOTO standard for decades represents a substantial departure from the application of the standard that has been relied upon by OSHA and employers alike. This expansion of the standard would require OSHA to change its enforcement and compliance actions to deal with
situations that were not previously covered by LOTO. Employers from every industry would also have to reevaluate their entire LOTO procedures and reassess whether servicing and maintenance operations of certain machines or equipment that were not previously covered would now fall under LOTO.

Perhaps most importantly this change would also eliminate cost-effective alternatives to LOTO which may be easier to manage as they are engineering controls as opposed to lockout procedures which are merely administrative controls dependent on employee actions to be effective. Even OSHA’s Compliance Directive for LOTO, specifically recognizes the use of alternatives to LOTO: “Likewise, to the extent that they eliminate or prevent employee exposure to hazardous energy, the use of machine guarding methods (e.g., barrier guards, enclosure guards) may be used as alternatives to LOTO during servicing and/or maintenance activities.” CPL 02-00-147, February 11, 2008. Moreover, there is no evidence that greatly expanding the coverage of LOTO would improve the safety and health of workers. In fact, this proposal may actually lessen the protection of workers by eliminating efforts by employers to create warning mechanisms to alert workers of expected energization of machines and equipment.

OSHA’s proposal to remove the term “unexpected” from the LOTO, in an effort to greatly expand its reach, is flawed in many respects. OSHA offers absolutely no support for its contention that “unexpected energization” was always intended by the Agency to mean “any re-energization.” 81 Fed. Reg. at 68506. The LOTO standard does not define “unexpected energization.” However, the 6th Circuit has held that in the context of the regulation the word connotes an “element of surprise.” Reich v. GMC, 89 F.3d 313, 315 (6th Cir. 1996). In GMC, the court did not defer to OSHA’s various interpretations of “unexpected” where it was not supported by a plain reading of the regulation and was not reasonable since it would render the term meaningless by expanding the standard’s application to cover virtually all machines. Id. at 316 (“[t]he drafters of the language obviously assigned importance to the word, and it is unreasonable for the Secretary to ignore it”). In affirming the findings of the Review Commission on this issue, the 6th Circuit held that the LOTO standard did not apply since the energization was not unexpected where the machines were immediately deactivated upon passing through electronically inter-locked gates and after that there was an eight to twelve step process to restart each machine along with audible or visual signals which alerted employees that the machines were about to start up. Id.

As it unsuccessfully argued in the GMC cases, OSHA is seeking to disregard the plain reading of the word “unexpected” in the standard in an effort to greatly expand its reach without any support for the proposal. The deletion of this word is also not in keeping with how the standard was originally written and how OSHA has historically interpreted the term. The various amendments and compliance directives cited by OSHA consistently use and confirm the term “unexpected.” Further, the Agency came up with 11 different factors that can be used by compliance officers and employers to evaluate whether a particular process avoided the unexpected energization of a machine or device so as to avoid the application of the LOTO standard. (CPL 02-00-147 at 3-5 to 3-6). While OSHA complains that this will require a case-by-case assessment, the application of many standards depends on this as well (such as machine guarding and proper fit of PPE) and OSHA has been able to set forth specific factors for compliance officers and employers to consider when evaluating such processes. Moreover, this assessment is derived from the plain reading of the text and thus is keeping with the original intent of the standard. The alternative to a case by case assessment would be some sort of one size fits all application which would be anathema to proper enforcement of OSHA’s regulations. While clarity is often
desirable, it should not come in the form of inflexible and unjustified expansion of OSHA’s enforcement authority.

This is also consistent with other provisions under LOTO which demonstrate that it does not apply to situations where there is no danger to employees of unexpected energization. For example, under § 1910.147(a)(2)(iii) LOTO does not apply to a cord and plug connected device if the plug is under the exclusive control of the employee performing the servicing and maintenance because there is no danger of the exposure to the hazards of unexpected energization or start-up of the equipment. On the other hand, the LOTO standard does apply to servicing taking place during normal production operations only where an employee is required to remove a guard or where the employee must place any part of his or her body in a zone of danger during the operation of the machine. 29 C.F.R. § 1910.147(a)(2)(ii)(A) and (B). In these two cases, LOTO would apply because employees are within the zone of danger while the machine is operating and energized.

In trying to avoid 20 years of precedent, OSHA argues that the GMC decisions fundamentally misconstrue the term “unexpected” because they allow employers to come up with alternatives to avoid having to follow the LOTO standard and that these alternatives are not as protective as LOTO. Yet it is OSHA that misconstrues the meaning of the term and the holding of these decisions. GMC was not about seeking alternatives to compliance with LOTO or whether such alternatives were as protective. Rather, the GMC decisions were about applying the actual meaning of the term used by OSHA and whether employees were afforded sufficient notice of the energization so as to avoid the zone of danger. See Reich v. GMC, 1995 OSAHRC LEXIS 58, *11 (O.S.H.R.C. Apr. 22, 1995).

OSHA’s reference to several other cases to support its interpretation also fails. In Otis Elevator, the D.C. Circuit distinguished the facts from GMC where there was no mechanism on the device that would signal when the jam would yield or the chain would move and thus the mechanic did not know when the release of energy would occur. Otis Elevator Co. v. Sec’y of Labor, 412 U.S. App. D.C. 116, 122 (2014). Likewise, in Burkes Mech, the Review Commission held that the fuel wood conveyor was neither deactivated nor “designed and constructed” to eliminate unexpected energization and was unlike the deactivated machines in GMC which had specific precautions designed to ensure employees had adequate notice to get out of the way before start-up occurred. Burkes Mech., 2007 OSAHRC LEXIS 48, *10 (O.S.H.R.C. July 12, 2007). These decisions, like the ones in GMC, confirm and uphold the plain meaning of the term “unexpected” within the LOTO standard and do not support OSHA’s attempted revision of this standard.

OSHA’s analysis is also flawed by maintaining that removing the word “unexpected” would not represent a revision to OSHA’s policy but instead only clarifies the Agency’s original meaning of the term “energization.” From this twisted logic, OSHA then concludes that this action would not result in any costs, compliance burdens, or additional employer responsibility other than what was originally considered under the adoption of the standard. 81 Fed. Reg. at 68529. OSHA makes this confounding assertion even after recognizing that it is proposing this revision in an effort to overturn precedent it disagrees with and to establish that the LOTO standard covers all equipment servicing activities without resorting to case-by-case assessment of whether the energization is unexpected. This proposal would necessarily shift the burden of analysis from OSHA onto employers and would subject many more operations and processes to the LOTO standard.
OSHA completely ignores the efforts taken by employers over many years to comply with the standard as currently written based on the reliance of Agency directives and legal interpretations that were used by the Agency for evaluation purposes. By greatly expanding the scope of this standard, employers will have to go back and reevaluate their operations to determine if any of their processes will now be covered by LOTO. If so, these employers will necessarily incur additional burdens and costs in assessing and creating new procedures to come into compliance. And for employers like GMC, all the time and money they spent on efforts to protect employees from the unexpected energization of machines and equipment will be wasted. Employers that undertook actions in reliance of the existing standard, case law and Agency guidance will have to scrap those efforts with no guarantee that doing so will improve worker safety by implementing different procedures. On that point, CWS also disagrees with the assertion that applying LOTO in more situations would improve worker safety. Throughout the entire discussion on this proposal, OSHA offers no evidence or examples that employees can be or were injured where the energization was something other than unexpected.

OSHA completely fails to take into account the new costs and burdens that this change would have on employers because of its claim that this was always the original intention of the standard. As demonstrated above, that point is not well supported. More importantly, regardless of the original intent, OSHA has admitted that this has not been upheld by the Review Commission and other courts. OSHA is trying to use the SIP process to make significant changes to its standards without having to go through a more comprehensive and challenging review of the standard by claiming that it is not making a substantial change to the standard at all. While the removal of a single word may seem minor, it can be very impactful.

Notwithstanding the concerns raised above, CWS recognizes, as did the 6th Circuit in GMC, that OSHA can engage in a formal rulemaking process if it wants to reconsider and broaden the application of the LOTO standard. However, by its own terms the SIP is not the appropriate place to make such a tremendous change to the scope and application of the LOTO standard. As stated under SIP-IV, the SIP process was intended solely to “remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in OSHA’s safety and health standards, which will permit better compliance by employers and reduce costs and paperwork burdens where possible, without reducing employee protections.” 81 Fed. Reg. 68504. OSHA even specifically acknowledged that SIP rulemakings are not designed to address large-scale revisions to standards which will increase the burden on employers. 77 Fed. Reg. 72781, 72782.

The removal of “unexpected” from the LOTO standard would drastically change the meaning and scope of standard and would impose significant new burdens on employers. Such a significant change to this standard is not appropriate under the SIP process and consequently should be removed from consideration at this time.

III. **OSHA Must Withdraw These Proposed Revisions Under SIP-IV**

OSHA seeks to make the changes addressed above through the SIP process which is reserved for minor revisions that are aimed at removing or revising standards so as to reduce the burden on employers. As these comments have established, the proposals addressed above represent substantial changes and reversals of positions and policies that have been in place for years and which have been
relied upon by employers. They warrant a more extensive rulemaking process than just being included in a large collection of other minor adjustments.

For the Coalition on Workplace Safety,

Air Conditioning Contractors of America
American Bakers Association
American Coke and Coal Chemicals Institute
American Feed Industry Association
American Forest and Paper Association
American Foundry Society
American Health Care Association
American Iron and Steel Institute
American Subcontractors Association, Inc.
American Supply Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Associated Wire Rope Fabricators
Distribution Contractors Association
Flexible Packaging Association
Global Cold Chain Alliance
Independent Electrical Contractors
Industrial Minerals Association - North America
International Dairy Foods Association
International Warehouse Logistics Association
IPC- Association Connecting Electronics Industries
Mason Contractors Association of America
Mechanical Contractors Association of America
Motor & Equipment Manufacturers Association
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Center for Assisted Living
National Federation of Independent Business
National Grocers Association
National Lumber & Building Material Dealers Association
National Roofing Contractors Association
National Tooling and Machining Association
National Utility Contractors Association
Non-Ferrous Founders’ Society
North American Die Casting Association
North American Meat Institute
Plastics Industry Association (PLASTICS)
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Sheet Metal and Air Conditioning Contractors National Association
SNAC International
Textile Rental Services Association
Tree Care Industry Association
U.S. Chamber of Commerce

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